LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 364

THE UNITED STATES OF AMERICA, PETITIONER

vs.

ALLIED OIL CORPORATION, P. & M. LIQUOR CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 18, 1950
CERTIORARI GRANTED DECEMBER 4, 1950

TRANSCRIPT OF RECORD

In the

United States Court of Appeals

For the Seventh Circuit

No. 10132

THE UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

ALLIED OIL CORPORATION,
Defendant-Appellee.

U. S. C. A.-7
FILED
MAR 15 1950
KENNETH F. CLOUTER
CLERK

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

TRANSCRIPT OF RECORD FILED MAR. 3, 1950.
PRINTED RECORD.

In the

United States Court of Appeals

For the Seventh Circuit

No. 10132

THE UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

ALLIED OIL CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

USCA 2204 The Gunthorp-Warren Printing Co., Chicago—3-14-50—60

INDEX.

Placita	1
Complaint, filed July 10, 1944	2
Order of substitution, entered June 27, 1946	4
Order of substitution, entered Dec. 23, 1946	4
Order of substitution, entered June 9, 1947	5
Transcript of Proceedings of Jan. 6 and 9, 1950	6
Motion to dismiss or abate, filed Jan. 27, 1950	13
Judgment, entered Jan. 27, 1950	15
Notice of appeal, filed Feb. 7, 1950	17
Statement of Points	19
Designation of Record	20
Clerk's Certificate	21

1 Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of January (it being the 2nd day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty and of the Independence of the United States of America, the 174th Year.

Present:

Honorable John P. Barnes, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. LaBuy, District Judge.
Honorable Elwyn R. Shaw, District Judge.
Honorable William H. Holly, District Judge.
Roy H. Johnson, Clerk.
Thomas P. O'Donovan, Marshal.

Friday, January 27, 1950.

Court met pursuant to adjournment.

Present: Honorable Michael L. Igoe, Trial Judge.

2 IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois,

Eastern Division.

Chester Bowles, Administrator, Office of Price Administration, for and on behalf of the United States,
Plaintiff,
vs.
Allied Oil Corporation of Illinois, a corporation,
Defendant.
} No. 44-C-796

Be It Remembered, that on to-wit, the 10th day of July, 1944, the above-entitled action was commenced by the filing of the following Complaint in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to-wit:

3 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—44-C-796) * *

COMPLAINT.

1. Plaintiff, as Administrator of the Office of Price Administrator, brings this action for treble damages on behalf of the United States, pursuant to the provisions of Section 205 (e) of the Emergency Price Control Act of 1942 (56 Stat. 23; 50 U. S. C. A. App. 901 (1942), as amended, said Act, as amended, being hereinafter called the Act.

2. Jurisdiction of this action is conferred upon this Court by Section 205 (e) of the Act and by said Section 205 (e) of the Act.

3. At all times hereinafter mentioned, there was in effect, pursuant to the Act, Maximum Price Regulation No. 88 (9 F. R. 1783), as amended, establishing maximum prices for the sale of petroleum products.

4. At all times hereinafter mentioned, the defendant was, and it is, a corporation organized and existing under

the laws of the State of Illinois, with its office and principal place of business in Chicago, Illinois, and it was, and is, engaged in the business of selling, among other things, petroleum products.

5. Between July 10, 1943 and July 10, 1944, which is more than six months after the date of the enactment and approval of the Act, the defendant sold and delivered petroleum products at prices higher than the maximum prices established therefor under the provisions of said Maximum Price Regulation No. 88, as amended.

6. None of the sales referred to in this preceding paragraph were made to purchasers for use or consumption other than in the course of trade or business.

4 7. Defendant demanded and received prices or consideration for the petroleum products sold and delivered, as aforesaid, in excess of the applicable maximum prices established therefor under the provisions of said Maximum Price Regulation No. 88, as amended.

Wherefore, plaintiff demands judgment for and on behalf of the United States against the defendant in the sum of three times the amount by which the prices and consideration received by the defendant, as aforesaid, on said sales and deliveries of petroleum products, exceeded the applicable maximum prices established therefor under the provisions of said Maximum Price Regulation No. 88, as amended.

Alex Elson,
Regional Attorney.

Robert Johnstone,
Acting Chief Enforcement Attorney.

Lewis M. Nowlan,
Enforcement Attorney.

5 And afterwards, to wit, on the 27 day of June, 1946, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

6 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—44-C-796) * *

ORDER OF SUBSTITUTION.

On stipulation of the parties hereto by their respective counsel to substitute Paul A. Porter, Administrator of the Office of Price Administration, for Chester Bowles, former Administrator of the Office of Price Administration, as plaintiff in this action, and the Court being fully advised in the premises:

It Is Ordered That said Paul A. Porter, Administrator of the Office of Price Administration, be and is hereby substituted for Chester Bowles as plaintiff in the above entitled matter.

Igoe,
United States District Judge.

7 And afterwards, to wit, on the 23rd day of December, 1946, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

8 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—44-C-796) * *

On agreement of the parties by counsel filed herein

It Is Ordered that Philip B. Fleming, Administrator, Office of Temporary Controls, for and on behalf of the United States, be substituted as plaintiff herein in lieu of Paul A. Porter, Administrator, Office of Price Administration, for and on behalf of the United States.

9 And afterwards, to wit, on the 9th day of June, 1947, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

10 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—44-C-796) * *

ORDER.

On motion of J. Albert Woll, United States Attorney for the Northern District of Illinois,

It Is Hereby Ordered:

1. That the United States of America is hereby granted leave to substitute as party plaintiff herein:

2. That J. Albert Woll, United States Attorney for the Northern District of Illinois is hereby granted leave to file his appearance herein on behalf of the United States of America.

Enter:

Igoe,
Judge.

Dated at Chicago, Illinois, this 9th day of June, A. D. 1947.

11 And afterwards on, to wit, the 28th day of February, 1950, there was filed in the Clerk's office of said Court a certain Transcript of Proceedings Had on January 6 and January 9, 1950, before Honorable Michael L. Igoe, Judge, in Causes, Numbered, 44 C 796, 44 C 1328, 45 C 740, 46 C 743, 46 C 1334, 46 C 1986, 47 C 523 and 47 C 604 in words and figures following, to wit:

13 United States of America,
Northern District of Illinois,
Eastern Division.

IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois,
Eastern Division.

UNITED STATES OF AMERICA, *vs.* ALLIED OIL CORPORATION.	Civil Action No. 44 C 786.
UNITED STATES OF AMERICA, *vs.* P & M LIQUOR CORPORATION, a corporation, *et al.*	No. 44 C 1328.
CHESTER BOWLES, Administrator, Office of Price Administration, for and on behalf of the United States, *vs.* NICRO STEEL PRODUCTS, INC., a corporation.	Civil Action No. 45 C 740.
UNITED STATES OF AMERICA, *vs.* HARVEY, INC., a corporation, etc., *et al.*	No. 46 C 743.
UNITED STATES OF AMERICA, *vs.* BEN ZELKEN and MORRIS BELSON d/b/a UNITED POTATO COMPANY.	No. 46 C 1334.

14

UNITED STATES OF AMERICA, *vs.* EVA METNICK, doing business as COUNTY DISTRIBUTORS, HARRY METNICK, MORRIS METNICK, JOE SILVA and JACK METNICK.	Civil Action No. 46 C 1986.
UNITED STATES OF AMERICA, *vs.* HAROLD SIEGLE and JEROME W. ROTH, individually and as co-partners, doing business as ELGIN LUMBER & SUPPLY COMPANY.	No. 47 C 523.
UNITED STATES OF AMERICA, *vs.* JACK STEIN, *et al.*	No. 47 C 604.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause taken before the Hon. Michael L. Igoe, one of the Judges of said Court, in his court room in the United States Court House at Chicago, Illinois, on Friday, January 6th, 1950, 10:00 o'clock a. m.

Appearances:

Hon. Otto Kerner, Jr., United States District Attorney, By Mr. John P. Lulinski and Mr. Maurice C. Handelman, Assistant District Attorneys, appeared on behalf of the Government;

15 Mr. Thomas J. Downs, appeared on behalf of Allied Oil Corporation;

Mr. Luis Kutner, appeared on behalf of P & M Liquor Corporation, et al.;

Messrs. Mulcahy, Murphy & Dieringer, appeared on behalf of Nicro Steel Products, Inc.;

Messrs. Freeman and Freeman, appeared on behalf of Harvey, Inc., et al.;

Mr. Robert P. Johnstone, appeared on behalf of Ben Zelken and Morris Beison;

Mr. Milton T. Raynor, appeared on behalf of Eva Metnick, et al.;

Messrs. McCarthy, Toomey & Reynolds, appeared on behalf of Harold Siegle and Jerome M. Roth;

Messrs. Sherwin and Sherwin, appeared on behalf of Jack Stein, et al.

16 The Clerk: Case 44 C 1328, United States *versus* P. M. Liquor Company, and various other O. P. A. cases.

Mr. Lulinski: I believe this is one of a series of O. P. A. cases being called before your Honor this morning for trial.

The Court: Yes. What is going to happen in these cases?

Mr. Lulinski: We have had a rather unfortunate experience in the handling of our entire number of O. P. A. cases. You will recall that originally we had some question about substitution and we took up the Wilkie case to the Court of Appeals and the Court of Appeals said that if we did not substitute in six months the cause of action abated, but in that opinion the Court noted the fact that we were the real parties in interest and could be substituted at any time, but Judge Lindley who wrote the opinion said he was not sure as to that point, and as a result of that opinion we have now pending before Judge Sullivan a motion to dismiss the actions on the ground that the United States cannot substitute itself for the Price Administrator and if Judge Sullivan grants that motion it will dismiss not only this action but every other O. P. A. action in the United States.

Our brief is due before Judge Sullivan next Thurs-
17 day. I have been giving quite a lot of consideration to it, along with several other matters, it is in the draft stage in our office and it will be on file before Judge Sullivan very shortly. I feel until such time as that one question is decided this matter should be held up, because if it should be held adversely to us I imagine every defendant should have the benefit of that decision, until such time as we can justify the appropriateness of a different decision in a higher court, and if Judge Sullivan should overrule the motion we can proceed with all of the cases on trial with a sense of security but until that time I do not think it would be worth while to set these cases for trial or for a definite decision until that matter has been taken care of.

We have been in a very unfortunate position as to these matters, your Honor, they have been turned over to us and ever since we have been tied up in a wrangle about our right to proceed.

The Court: Why can't they make that same motion over there and we can dispose of it?

Mr. Lulinski: There is no objection to that, if anyone makes that motion.

The Court: I don't know when that other case will
18 be disposed of.

Mr. Lulinski: Even if that case were decided the other way, there is no objection on our part if one of these defendants make that motion before your Honor. We are not going to oppose such a motion and it might be one way of bringing definite action from the Court. We are not reluctant to prosecute these cases but we are in the position where if the decision is held against us, it would save as from going through a lot of fruitless gestures.

The Court: Here is a case five years old.

Mr. Lulinski: That is true, and I believe I have some 1943 cases on my calendar and they are all being held up on account of the procedural question.

The Court: The whole point involved here is whether the United States may substitute itself in lieu of the preceding O. P. A. officials?

Mr. Lulinski: That is the question to be disposed of before the Court, and there seems to be some intimation in the decision by Judge Lindley that the United States may not be able to substitute itself. One of the points we raised was that we could substitute ourselves at any time as we

raised the question of being the real parties in interest in the Circuit Court of Appeals.

19 The Court: Well, if one of these defendants wants to raise the point that was raised before Judge Sullivan, I will dispose of it.

Mr. Lulinski: I have no objection.

The Court: They ought to have it raised so the record will be worth while.

Mr. Richards: I would like, at this time, to make a motion to dismiss on the ground that it is a five year old case.

The Court: That is not a ground for dismissal even if it was ten years old.

Mr. Richards: I move to dismiss it for want of prosecution.

The Court: The age of the case does not justify its dismissal.

Mr. Richards: But the fact it has been continued and continued.

The Court: As to this matter of continuing, I do not blame you for complaining about it, and I do not think that Mr. Lulinski feels you are unjustified but these things are given to him in his office and they have left him what were the worst ones of the O. P. A. cases, but if the Government has no authority to carry on here, we ought to bring

20 it to an end and if somebody will make that kind of a motion and bring it in in the next few days we will continue all of these cases to that time and dispose of them on that kind of a motion.

I suggest you attorneys who are interested in this matter look into it a little bit and have the motion in proper order.

Mr. Richards: Yes, your Honor, I will.

The Court: It is a very interesting proposition and the Government would like to have it disposed of.

Mr. Lulinski: We would like to have the matter disposed of, too, but our hands are tied on account of that question.

The Court: Which one of you lawyers is going to get up this motion?

Mr. Richards: I will be glad to present that motion.

The Court: What about you, Brother McCarthy, are you going to join in that?

Mr. McCarthy: Yes, your Honor.

The Court: Why don't you folks have a meeting and we will continue this to Monday and you folks have a confer-

ence back in one of the rooms there, or in my library, and decide what kind of a motion you want to bring in on Monday.

21 You get the point, gentlemen. You want the motion worded so that you will have a record to stand on in case the Government goes up.

It is understood all of these O. P. A. cases on call for this morning will be continued until Monday morning, January 9th, 1950, at 10:00 o'clock a. m.

(Whereupon, an adjournment was taken in the above-entitled case to Monday January 9, 1950, at 10:00 o'clock a. m.)

22 IN THE DISTRICT COURT OF THE UNITED STATES.

(Captions—44-C-796-1328, 45-C-740, 46-C-743-1334-1986, 47-C-523-604)

23 TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause taken before the Hon. Michael L. Igoe, one of the Judges of said Court, in his court room in the United States Court House at Chicago, Illinois, on Monday, January 9th, 1950, at 10:00 o'clock a. m.

Appearances:

Same as before.

24 The Clerk: Case No. 44 C 1328, United States *versus* P. M. Liquor Company and others.

The Court: Somebody was going to prepare an appropriate motion in this matter.

Mr. Sherwin: We have prepared a motion, and have examined the record before Judge Sullivan in respect to the case that the District Attorney made reference to.

There is a difference in that case because there there was a motion to substitute as party plaintiff. However, on the substantive question of law the case will stand or fall on the same point, that is that the United States of America is not a party plaintiff in interest or a real party in interest.

In that case briefs have been filed before Judge Sullivan and it is set for oral argument at the end of the month. I have prepared my motion and I think the language is proper to dismiss or abate in accordance with Rule 25-d of the Rules of Civil Procedure.

The ground is that there has been no proper showing made to the Court within six months by the Secretary of Commerce who, we say, is the successor in office to Phillip Fleming, Administrator, Office of Temporary Controls, Office of Price Administration, and therefore the case
25 should be dismissed for that reason.

There was a motion to abate that case, and we got the language from the other case, while there was still the six months period in which the Secretary of Commerce could have come into court so there would have been a proper party plaintiff, so we are in the position that the United States is not the real party in interest and not the proper party plaintiff and more than six months has passed in which the proper party, the Secretary of Commerce, could have come into this court and substituted, and that is the reason for our motion to dismiss.

If your Honor wants, I think we should have briefs in support, we will be glad to furnish them.

The Court: Are you raising a point which, in your judgment, is a sufficient bar to prosecution?

Mr. Sherwin: Yes. I am raising a point which, in my judgment, is a sufficient bar to prosecution and if this motion is allowed the Government cannot come in with anybody else because more than six months have passed when the proper party plaintiff could have substituted.

The Court: Is the record now in shape, with the paper you are now filing, so if the Government appeals the
26 case you can stand on your record?

Mr. Sherwin: I think, based on the record, I have the best possible motion.

The Court: Then we can act on this today and if the Government wants to go up on it, they can go up on it.

Mr. Sherwin: We all have the same motion.

The Court: That is the way I understood it was to be brought up.

Mr. Sherwin: I don't want to be entrapped by the Government, I am not conducting this at all. I just assumed the responsibility due to your Honor's suggestion, and we welcome it, but I don't want the Government to entrap me.

The Court: I think the Government wants some one or all of these cases in shape so that they can go up on them and I gather that from what Mr. Lulinski said, so it would be settled once and for all.

Mr. Handleman: I have been working with Mr. Lulinski on these cases and practically the argument is whether the Secretary of Commerce should bring the suit in his own name.

The Court: Mr. Lulinski takes the position that the United States can act whether acting through the Secretary of Commerce or anyone else.

27 It seems like a narrow point but someone should take it up and see what the answer is.

Mr. Sherwin: Our motion and the case before Judge Sullivan is predicated on the Wilkie case to see if the United States is the real party in interest.

The Court: What is the motion?

Mr. Sherwin: To dismiss or in the alternative to abate the cases in this proceeding.

The Court: Do you have a written order you want signed?

Mr. Sherwin: I will be glad to bring it in. I haven't it with me.

The Court: If you folks are wise, I think you should all do that so the Government will know what the record is.

Mr. Sherwin: So the record will be clear, I will say that it was continued until today but there was no formal motion made. I will hand your Honor a copy.

Mr. Handleman: I don't think that is necessary.

The Court: They are all here.

Mr. Handleman: Is your Honor going to act on this motion?

The Court: I am going to sign this order as soon as it is brought in in each one of these cases, so you will bring in an order, there are eight cases and I under-

28 stand the same motion is being made in all of these cases.

(Which was all of the proceedings had on the hearing of the above-entitled numbered cause.)

29 And on, to wit, the 27th day of January, 1950 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Motion to Dismiss or Abate in words and figures following, to wit:

30 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—44-C-796) * *

MOTION TO DISMISS OR ABATE.

Now comes Allied Oil Corporation, defendant by Thomas J. Downs, its attorney, and moves the court to dismiss, or in the alternative to abate the above entitled cause on the ground that the said cause is not being prosecuted in the name of or by the real party in interest, and that no timely substitution of plaintiff has been made, and in support of said motion states the following:

1. The above entitled cause was filed herein on July 10, 1944 by Chester Bowles as Administrator, Office of Price Administration, for and on behalf of the United States. The complaint is based upon the Emergency Price Control Act of 1942 (56 Stat. 23; 50 U. S. C. 901, et seq.) as amended and extended, and Maximum Price Regulation No. 88 as amended, duly promulgated pursuant to said Act.

2. On June 27, 1946, Paul A. Porter, by order of this court, was substituted for said Chester Bowles as Administrator, party plaintiff.

31 3. On December 23, 1946 Philip B. Fleming, Administrator, Office of Temporary Controls, Office of Price Administration, was substituted for said Paul A. Porter, Administrator, as party plaintiff.

4. On April 23, 1947 the President of the United States promulgated Executive Order 9841 (12 Fed. Reg. 2645) effective June 1, 1947 terminated the Office of Temporary Controls and transferred its functions with certain exceptions to the Secretary of Commerce, which order provided that all functions vested in the Temporary Controls Administrator, with certain exceptions are "transferred to the Secretary of Commerce and shall be performed by him or subject to his direction and control by such officers or agencies of the Department of Commerce as the Secretary may designate. * * *"

5. Thereafter, on June 9, 1947, an order was entered by this Honorable Court substituting United States of America as party plaintiff therein; that at no time during this proceeding has the Secretary of Commerce, the successor to Philip B. Fleming, Temporary Controls Administrator, sought leave to substitute as party plaintiff, and has in fact failed within six months after taking office as such Administrator to satisfactorily show to this Honorable Court that there is substantial need for continuing and maintaining this action and to move to be substituted as plaintiff in conformity with Rule 25d of the Federal Rules of Civil Procedure.

32 6. That Rule 17a of the Federal Rules of Civil Procedure requires that every action shall be prosecuted in the name of the real party in interest, and as appears from the foregoing the real party in interest herein is not the United States of America but is the Secretary of Commerce of the United States who is designated as successor in office to the original plaintiff herein.

Wherefore, defendant moves this Honorable Court that the order of June 9, 1947 appointing United States of America as substitute plaintiff herein be vacated and this cause be dismissed for failure of the Secretary of Commerce to be substituted as party plaintiff within six months from his appointment as such successor Administrator.

Allied Oil Corporation,
defendant,
By Thomas J. Downs,
Its Attorney.

33 And on the same day, to wit, on the 27th day of January, 1950, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

34 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—44-C-796) * *

ORDER.

This Cause coming on to be heard on the motion of the defendant Allied Oil Corporation to dismiss the above entitled cause on the ground that the said cause is not being prosecuted in the name of or by the real party in interest, due notice having been given to all parties of record, and the court having heard arguments of counsel and being fully advised in the premises, Finds That:

1. The above entitled cause was filed herein on July 10, 1944 by Chester Bowles as Administrator, Office of Price Administration, for and on behalf of the United States. The complaint is based upon the Emergency Price Control Act of 1942 (56 Stat. 23; 50 U. S. C. 901, et seq.) as amended and extended, and Maximum Price Regulation No. 88 as amended, duly promulgated pursuant to said Act.

2. On June 27, 1946 Paul A. Porter, by order of this court, was substituted for said Chester Bowles as Administrator, party plaintiff.

35 3. On December 23, 1946 Philip B. Fleming, Administrator, Office of Temporary Controls, Office of Price Administration, was substituted for said Paul A. Porter, Administrator, as party plaintiff.

4. On April 23, 1947 the President of the United States promulgated Executive Order 9841 (12 Fed. Reg. 2645) effective June 1, 1947 terminated the Office of Temporary Controls and transferred its functions with certain exceptions to the Secretary of Commerce, which order provided that all functions vested in the Temporary Controls Administrator, with certain exceptions are "transferred to the Secretary of Commerce and shall be performed by him or subject to his direction and control by such officers or agencies of the Department of Commerce as the Secretary may designate * * *".

5. On June 9, 1947 an order was entered by this court substituting United States of America as party plaintiff herein.

6. At no time during this proceedings has the Secretary of Commerce, the successor to Philip B. Fleming, Temporary Controls Administrator, sought leave to substitute as party plaintiff, and he has in fact failed within six months after taking office to show satisfactorily to the court that there is a substantial need for continuing and maintaining this action and to move to be substituted as plaintiff in conformity with Rule 25d of the Federal Rules of Civil Procedure.

36 7. The United States of America is not the real party in interest and therefore cannot properly prosecute this case, the real party in interest being the Secretary of Commerce of the United States. The said Secretary of Commerce having failed to move to be substituted as plaintiff in conformity with Rule 25d, the above entitled cause is therefore abated.

It Is Therefore Hereby Ordered, Adjudged and Decreed that the order of June 9, 1947 substituting the United States of America as party plaintiff in this cause, be, and the same is hereby vacated, and this cause is hereby dismissed for failure of the Secretary of Commerce to be substituted as party plaintiff within six months from his appointment as such successor Administrator.

Enter:

Igoe,
Judge.

37 And afterwards on, to wit, the 7th day of February, 1950, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Notice of Appeal in words and figures following, to wit:

38 IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois,

Eastern Division.

United States of America,
Plaintiff,
vs.
Allied Oil Corporation,
Defendant.
} Civil Action No. 44 C 796.

NOTICE OF APPEAL.

To: Mr. Thomas J. Downs,
Attorney at Law,
135 South La Salle Street,
Chicago, Illinois.

Now comes the United States of America by Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and hereby gives Notice of Appeal by the plaintiff in the above-entitled cause to the United States Court of Appeals for the Seventh Circuit from the final Order entered herein dismissing the cause on January 27, 1950.

Otto Kerner, Jr.,
United States Attorney for the Northern District of Illinois, Eastern Division.

Dated: Chicago, Illinois, this 7th day of February, A. D. 1950.

(Certificate of Mailing Attached Hereto:)

39 United States of America,
Northern District of Illinois. } ss.

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that on February 7, 1950, in accordance with Rule 73 (b) of the Federal Rules of Civil Procedure a copy of the foregoing Notice of Appeal was mailed to:

Mr. Thomas J. Downs,
135 S. La Salle St.,
Chicago, Illinois.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, this 7th day of February, A. D. 1950.

Roy H. Johnson,
Clerk.

(Seal)

By Gizella Butcher,
Deputy Clerk.

40 And afterwards on, to wit, the 10th day of February, 1950, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Statement of Points Relied on Appeal in words and figures following, to wit:

41 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—44-C-796) * *

STATEMENT OF POINTS RELIED UPON ON APPEAL.

The United States of America relies upon the following points on appeal.

1. The Court below erred in granting the defendant's Motion to Dismiss, and ordering that the cause be dismissed upon the ground that the United States of America is not a proper party plaintiff.

2. The Court below erred in holding that this action could not be conducted and maintained in the name of the United States, the said ruling being contrary to the provisions of Section 901 of Title 50 United States Code, as amended (Act of July 25, 1946, 60 Stat. 664) and Executive Order No. 9842 issued by the President in pursuance of his authority under the Constitution and statutes of the United States, including Title I of the First War Powers Act, 1941.

3. The Court below erred in failing to hold that the United States is the real party in interest, properly substituted as party plaintiff.

Otto Kerner, Jr.,
United States Attorney.

42 And on the same day, to wit, the 10th day of February, 1950, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Designation of Record in words and figures following, to wit:

43 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—44-C-796) * *

DESIGNATION OF RECORD.

The United States of America, by Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, designates the following portions of the record to be contained in the record on the appeal of this cause:

1. Complaint filed July 10, 1944.
2. Order entered June 27, 1946, substituting Paul A. Porter as party plaintiff in lieu of Chester A. Bowles.
3. Order entered December 23, 1946, substituting Philip B. Fleming for and on behalf of the United States in place and in stead of Paul A. Porter as party plaintiff.
4. Order entered June 9, 1947, substituting the United States of America as party plaintiff.
5. Motion to Dismiss or Abate filed January 27, 1950.
6. Order entered January 27, 1950, vacating order of June 9, 1947, and dismissing case.
7. Notice of Appeal.
8. Copy of this Designation.
9. Statement of Points Relied Upon on Appeal.
10. Transcript of proceedings before the Honorable Michael L. Igoe, on January 6, 1950 and January 9, 1950.

Otto Kerner, Jr.,
United States Attorney.

(Affidavit of Mailing attached but not copied.)

44 United States of America, }
Northern District of Illinois. } ss.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Designation filed in this Court in the cause entitled: United States of America, Plaintiff *vs.* Allied Oil Corporation, Defendant, No. 44-C-796, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 3rd day of March, 1950.

(Seal)

Roy H. Johnson,
Clerk.
By Gizella Butcher,
Deputy Clerk.

HEARD JUN 23 1950 BY 27

TRANSCRIPT OF RECORD

United States Court of Appeals

For the Seventh Circuit

No. 10143

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

[illegible] CORPORATION, et al.,
Defendants-Appellees.

[illegible]

[illegible]

[illegible]

INDEX.

Placita	1
Complaint, filed Nov. 1, 1944	2
Order of substitution, entered May 31, 1946	6
Order of substitution, entered Jan. 9, 1947	6
Order of substitution, entered June 9, 1947	7
Motion to dismiss, filed Jan. 9, 1950	7
Judgment, entered Jan. 9, 1950	9
Notice of appeal, filed Feb. 7, 1950	11
Statement of Points	12
Designation of Record	13
Clerk's Certificate	14

Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of January (it being the 2nd day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty and of the Independence of the United States of America, the 174th Year.

Present:

Honorable John P. Barnes, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. La Buy, District Judge.
Honorable Elwyn R. Shaw, District Judge.
Honorable William H. Holly, District Judge.
Roy H. Johnson, Clerk.
Thomas P. O'Donovan, Marshal.

Monday, January 9, 1950.

Court met pursuant to adjournment.

Present: Honorable Michael L. Igoe, Trial Judge.

2 IN THE UNITED STATES DISTRICT COURT.

For the Northern District of Illinois,

Eastern Division.

Chester A. Bowles, Administrator, Office of Price Administration, for and on behalf of the United States,
Plaintiff,
vs.
P & M Liquor Corp., a corporation, Sidney Prosterman, Leo B. Mitteldorf and Helen Mitteldorf,
Defendants.
} No. 44-C-1328.

Be It Remembered, that, on to-wit, the 1st day of November, 1944, the above-entitled action was commenced by the filing of the following Complaint in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division in words and figures following, to-wit:

3 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—44-C-1328) * *

COMPLAINT.

Count I.

1. In plaintiff's judgment, the defendants have engaged in acts and practices which constitute violations of Section 4 (a) of the Emergency Price Control Act of 1942 (56 Stat. 23; 50 U. S. C. A. App. Sec. 904), as amended, hereinafter called the Act, in that they have violated Maximum Price Regulation No. 445 (8 Fed. Reg. 11161), as amended, and Maximum Price Regulation No. 193 (7 Fed. Reg. 6006), as amended. Pursuant to Section 205 (a) of said Act, as amended, plaintiff brings this action to enforce compliance with said Section 4 (a).

2. Jurisdiction of this action is conferred upon this Court by Section 205 (e) of the Act.

3. On August 5, 1942, Maximum Price Regulation No. 193 became effective, and as amended from time to time has, continuously since that date, been in effect, establishing maximum prices for the sale of domestic distilled spirits. On August 14, 1943, Maximum Price Regulation No. 445 became effective, and as amended from time to time has, continuously since that date, been in effect, establishing maximum prices for the sale of distilled spirits and wines.

4. The defendants, P & M Liquor Corp., a corporation, Sidney Prosterman, Leo B. Mitteldorf and Helen Mitteldorf, at all times hereinafter mentioned were, and are, engaged in the business of selling distilled spirits, with their principal place of business in Chicago, Illinois.

5. On November 1, 1943, and on divers dates thereafter, defendants did offer, attempt, and agree to sell, solicit
4 sales of, sell and deliver distilled spirits at prices in excess of the maximum prices established therefor by Maximum Price Regulation No. 445, as originally issued, and as amended, and Maximum Price Regulation No. 193, as originally issued, and as amended.

6. Since the effective date of Maximum Price Regulation No. 445, and Maximum Price Regulation No. 193, defendants have failed to prepare, properly prepare, keep, preserve, and make available books, records, reports, invoices, and statements as required by said regulations, as originally issued and as amended.

Count II.

1. Plaintiff, as Administrator of the Office of Price Administration, brings this action for treble damages on behalf of the United States, pursuant to the provisions of Section 205 (e) of the Emergency Price Control Act of 1942 (56 Stat. 23; 50 U. S. C. A. App. Sec. 925), enacted January 30, 1942, as amended, said Act, as amended, being hereinafter called the Act.

2. Jurisdiction of this action is conferred upon this Court by Section 205 (e) of the Act and by said Section 205 (e) of the Act.

3. Paragraph 3 of Count I is incoporated herein by reference as if fully set forth herein.

4. Paragraph 4 of Count I is incorporated herein by reference as if fully set forth herein.

5. On November 1, 1943, which is more than six months

after the date of the enactment and approval of the Act, and on divers dates thereafter, the defendants sold and delivered distilled spirits at prices in excess of the maximum prices established therefor by Maximum Price Regulation No. 445, as amended, and Maximum Price Regulation No. 193, as amended.

6. None of the sales referred to in Paragraph 5 hereof was made to purchasers for use or consumption other than in the course of trade or business.

7. The aggregate amount by which the prices or consideration, demanded and received by defendants on said sales of distilled spirits, exceeded the applicable maximum prices established therefor by Maximum Price Regulation No. 445, as amended, and Maximum Price Regulation No. 193, as amended, is the sum of $106,954.00. Three times said aggregate amount equals the sum of $320,862.00.

Wherefore, the plaintiff demands:

(1) A preliminary and a final injunction enjoining the defendants, their agents, attorneys, servants, employees, and all persons in active concert or participation with defendants, from directly or indirectly selling, delivering, soliciting the sale of, or offering for sale or delivery, or attempting or agreeing to sell distilled spirits, at prices in excess of the maximum prices established therefor by Maximum Price Regulation No. 445, as amended, Maximum Price Regulation No. 193, as amended, or any other Office of Price Administration regulations, heretofore or hereafter issued establishing maximum prices for the sale of distilled spirits, as said regulations were heretofore or shall hereafter be amended or revised; and

(2) A preliminary and final injunction requiring the defendants to prepare, keep, preserve, and make available for examination, books, records, reports, invoices, and statements as required by Maximum Price Regulation No. 445, as amended, Maximum Price Regulation No. 193, as amended, or any other Office of Price Administration regulations heretofore or hereafter issued establishing maximum prices for the sale of distilled spirits, as said regulations were heretofore or shall hereafter be amended or revised; and

(3) Judgment for and on behalf of the United States, against the defendants, in the sum of $320,862.00, and costs.

(4) Such other, further and different relief as to the Court may seem just and proper.

Dated: November 1, 1944.

Chester A. Bowles, Administrator, Office of Price Administration,
By Homer C. Clay,
Acting District Enforcement Attorney Chicago Metropolitan Area,

Quintin Johnstone,
Chief, Food Enforcement Section Chicago Metropolitan Area.

Robert J. Stastny,
Enforcement Attorney.

Office of Price Administration,
Chicago Metropolitan Area,
222 West Adams Street,
Chicago, Illinois,
Andover 3600.

6 And afterwards, to wit, on the 31st day of May, 1946, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

7 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—44-C-1328) * *

ORDER OF SUBSTITUTION.

This matter coming on to be heard on the motion and stipulation to substitute Paul A. Porter, Administrator of the Office of Price Administration, for Chester Bowles, former Administrator of the Office of Price Administration, as plaintiff in this action, and the Court being fully advised in the premises:

It Is Ordered that said Paul A. Porter, Administrator of the Office of Price Administration, be and is hereby substituted for Chester Bowles as plaintiff in the above entitled matter.

Entered at Chicago, Illinois, this 31st day of May, 1946.

Igoe,
United States District Judge.

O. K. for Defts.:
Luis Kutner.

8 And afterwards, to wit, on the 9th day of January, 1947, being one of the days of the regular December, 1946, term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Walter J. LaBuy, District Judge, appears the following entry, to wit:

9 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—44-C-1328) * *

It Is Ordered by the Court that Philip B. Fleming, Admr., Office of Temporary Controls, for and on behalf of the United States, be and he is hereby substituted as party plaintiff in place and stead of Paul A. Porter, Administrator, etc.

10 And afterwards, to wit, on the 9th day of June, 1947, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

11 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—44-C-1328) * *

ORDER.

On motion of J. Albert Woll, United States Attorney for the Northern District of Illinois,

It Is Hereby Ordered:

1. That the United States of America is hereby granted leave to substitute as party plaintiff herein:

2. That J. Albert Woll, United States Attorney for the Northern District of Illinois is hereby granted leave to file his appearance herein on behalf of the United States of America.

Enter:

Igoe,
Judge.

Dated at Chicago, Illinois, this 9th day of June, A. D. 1947.

12 And afterwards on, to wit, the 9th day of January, 1950, came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Motion To Dismiss, in words and figures following, to wit:

13 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—44-C-1328) * *

MOTION TO DISMISS.

Now Come P & M Liquor Corporation, a Corporation, (dissolved), Sidney Prosterman, Leo B. Mitteldorf and Helen Mitteldorf, Defendants herein, by their Attorney Luis Kutner, and respectfully move the Court to dismiss the above entitled cause on the ground that the said cause

is not being prosecuted in the name of or by the real party in interest, and in support of said Motion state the following:

I.

On November 1, 1944, by Chester A. Bowles, Office of Price Administration, the above entitled cause was filed herein for and on behalf of the United States. The Complaint is based upon Emergency Control Act of 1942 (56 Stat. 23, U. S. C. A. App. Secs. 904, 925) as amended and Maximum Price Regulations #445 and 193, as amended, duly promulgated pursuant to said Act;

II.

Thereafter on June 26, 1946, an Order was entered by this Court substituting Paul A. Porter for Chester A. Bowles as party Plaintiff herein.

14 III.

Thereafter on January 9, 1947, an Order was entered by this Court substituting Philip B. Fleming, Temporary Controls Administrator, for Paul A. Porter as party plaintiff herein;

IV.

On April 23, 1947, the President of the United States promulgated Executive Order 9841 (12 Fed. Reg. 2645) which, effective June 1st, 1947, terminated the Office of Temporary Controls and transferred its functions with certain exceptions to the Secretary of Commerce, which Order provides that all functions vested in the Temporary Controls Administrator with certain exceptions are "transferred to the Secretary of Commerce" and shall be performed by him, or subject to his direction and control by such officers or agencies of the Department of Commerce as the Secretary may designate. * * *

V.

Thereafter on June 9, 1947, an Order was entered by this Court substituting United States of America as party plaintiff therein; however, at no time during this proceeding has the Secretary of Commerce, the successor to Philip B. Fleming, Temporary Controls Administrator, sought

leave to substitute as party plaintiff, and has in fact failed within six months after taking office to satisfactorily show to the Court that there is a substantial need for continuing and maintaining this action and to move to be substituted as plaintiff in conformity with Rule 25d of the Federal Rules of Civil Procedure;

VI.

That Rule 17A of the Federal Rules of Civil Procedure requires that every action shall be prosecuted in the
15 name of the real party in interest, and as appears from the foregoing the real party in interest herein is not the United States of America but is the Secretary of Commerce of the United States who is designated as successor in office to the original plaintiff herein.

Wherefore Defendants move the Court that the above entitled cause be dismissed.

Luis Kutner,
Attorney for Defendant.

16 And on the same day, to wit, on the 9th day of January, 1950, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

17 In the District Court of the United States.

* * (Caption—44-C-1328) * *

ORDER.

This cause coming on to be heard on the motion of the Defendants to dismiss the above entitled cause and due notice being served upon parties in interest herein, and the court having considered the contents of the motion, the statement of counsel and being fully advised in the premises doth find:

I.

That it has jurisdiction of the subject matter and the parties hereto;

II.

Rule 17A of the Federal Rules of Civil Procedure requires that every act shall be prosecuted in the name of the real party in interest;

III.

That the real party in interest is not the United States of America, the present Plaintiff, but is the Secretary of Commerce of the United States, pursuant to Executive Order 9841 (12 Fed. Reg. 2645);

That at no time during this proceeding has the Secretary of Commerce of the United States, the successor to Philip B. Fleming, Temporary Controls Administrator, sought leave to substitute as party plaintiff, and has in fact failed within six months after taking office to satisfactorily show to the Court that there is a substantial need for continuing and maintaining this action and to move to be substituted as plaintiff in conformity with Rule 25D of the Federal Rules of Civil Procedure.

It Is Therefore Ordered that the above entitled cause be and is hereby dismissed.

Dated this 9th day of January, A. D. 1950.

Enter:

Igoe,
Judge.

19 And afterwards on, to wit, the 7th day of February, 1950, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Notice of Appeal, in words and figures following, to wit:

20 IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois,

Eastern Division.

United States of America, *Plaintiff*, *vs.* P & M Liquor Corporation, a corporation, *et al.*, *Defendants.*	No. 44-C-1328.

NOTICE OF APPEAL.

To: Luis Kutner, Esquire, 105 West Adams Street, Chicago, Illinois.

Now comes the United States of America, by Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and hereby gives notice of appeal by the plaintiff in the above-entitled cause to the United States Court of Appeals for the Seventh Circuit from the final order entered herein, dismissing the cause on January 9, 1950.

Otto Kerner, Jr.,
United States Attorney.

(Certificate of Mailing Attached Hereto:)

21 United States of America,
Northern District of Illinois. } ss.

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that on February 7, 1950, in accordance with Rule 73 (b) of the Federal Rules of Civil Procedure a copy of the foregoing Notice of Appeal was mailed to:

Luis Kutner,
105 W. Adams St.,
Chicago, Illinois.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, this 7th day of February, A. D. 1950.

Roy H. Johnson,
Clerk,
By Gizella Butcher,
Deputy Clerk.

(Seal)

22 And afterwards on, to wit, the 10th day of February, 1950, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Statement Of Points, in words and figures following, to wit:

23 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—44-C-1328) * *

STATEMENT OF POINTS RELIED UPON ON APPEAL.

The United States of America relies upon the following points on appeal:

1. The Court below erred in granting the defendants' Motion to Dismiss, and ordering that the cause be dismissed upon the ground that the United States of America is not a proper party plaintiff.

2. The Court below erred in holding that this action could not be conducted and maintained in the name of the United States, the said ruling being contrary to the provisions of Section 901 of Title 50 United States Code, as

amended (Act of July 25, 1946, 60 Stat. 664) and Executive Order No. 9842 issued by the President in pursuance of his authority under the Constitution and statutes of the United States, including Title I of the First War Powers Act, 1941.

3. The Court below erred in failing to hold that the United States is the real party in interest, properly substituted as party plaintiff.

Otto Kerner, Jr.,
United States Attorney.

(Affidavit of Mailing Attached But Not Copied.)

24 And on the same day, to wit, the 10th day of February, 1950, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Designation Of Record, in words and figures following, to wit:

25 IN THE UNITED STATES DISTRICT COURT.
(Caption—44-C-1328)

DESIGNATION OF RECORD.

The United States of America, by Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, designates the following portions of the record to be contained in the record on the appeal of this cause:

1. Complaint filed November 1, 1944.
2. Order entered May 31, 1946, substituting Paul A. Porter as party plaintiff.
3. Order entered January 9, 1947, substituting Philip B. Fleming, Administrator, Office of Temporary Controls, for and on behalf of the United States, as party plaintiff in place and stead of Paul A. Porter.
4. Order entered June 9, 1947, substituting the United States of America as party plaintiff.
5. Motion to dismiss, filed January 9, 1950.
6. Order entered January 9, 1950, dismissing this cause.
7. Notice of Appeal.
8. Copy of this Designation.
9. Statement of Points Relied upon on Appeal.
10. Transcript of proceedings had before the Honorable Michael L. Igoe, on January 6, 1950 and January 9, 1950.

Otto Kerner, Jr.,
United States Attorney.

21 United States of America,
Northern District of Illinois. } ss.

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that on February 7, 1950, in accordance with Rule 73 (b) of the Federal Rules of Civil Procedure a copy of the foregoing Notice of Appeal was mailed to:

Luis Kutner,
105 W. Adams St.,
Chicago, Illinois.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, this 7th day of February, A. D. 1950.

Roy H. Johnson,
Clerk,
By Gizella Butcher,
Deputy Clerk.

(Seal)

22 And afterwards on, to wit, the 10th day of February, 1950, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Statement Of Points, in words and figures following, to wit:

23 IN THE UNITED STATES DISTRICT COURT.
(Caption—44-C-1328)

STATEMENT OF POINTS RELIED UPON ON APPEAL.

The United States of America relies upon the following points on appeal:

1. The Court below erred in granting the defendants' Motion to Dismiss, and ordering that the cause be dismissed upon the ground that the United States of America is not a proper party plaintiff.

2. The Court below erred in holding that this action could not be conducted and maintained in the name of the United States, the said ruling being contrary to the provisions of Section 901 of Title 50 United States Code, as

amended (Act of July 25, 1946, 60 Stat. 664) and Executive Order No. 9842 issued by the President in pursuance of his authority under the Constitution and statutes of the United States, including Title I of the First War Powers Act, 1941.

3. The Court below erred in failing to hold that the United States is the real party in interest, properly substituted as party plaintiff.

Otto Kerner, Jr.,
United States Attorney.

(Affidavit of Mailing Attached But Not Copied.)

24 And on the same day, to wit, the 10th day of February, 1950, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Designation Of Record, in words and figures following, to wit:

25 IN THE UNITED STATES DISTRICT COURT.

(Caption—44-C-1328)

DESIGNATION OF RECORD.

The United States of America, by Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, designates the following portions of the record to be contained in the record on the appeal of this cause:

1. Complaint filed November 1, 1944.
2. Order entered May 31, 1946, substituting Paul A. Porter as party plaintiff.
3. Order entered January 9, 1947, substituting Philip B. Fleming, Administrator, Office of Temporary Controls, for and on behalf of the United States, as party plaintiff in place and stead of Paul A. Porter.
4. Order entered June 9, 1947, substituting the United States of America as party plaintiff.
5. Motion to dismiss, filed January 9, 1950.
6. Order entered January 9, 1950, dismissing this cause.
7. Notice of Appeal.
8. Copy of this Designation.
9. Statement of Points Relied upon on Appeal.
10. Transcript of proceedings had before the Honorable Michael L. Igoe, on January 6, 1950 and January 9, 1950.

Otto Kerner, Jr.,
United States Attorney.

26 United States of America,
Northern District of Illinois. } ss.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing together with the Transcript of Proceedings incorporated and certified this day in the Transcript of Record on Appeal, in the cause entitled: United States of America, Plaintiff *vs.* Allied Oil Corporation, Defendant, No. 44-C-796, to be a true and complete transcript of the proceedings had of record made in accordance with the Designation filed in this Court in the cause entitled P & M Liquor Corporation, a corporation, et al., Defendants, No. 44-C-1328, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 3rd day of March, 1950.

Roy H. Johnson,
Clerk,
By Gizella Butcher,
Deputy Clerk.

(Seal)

47

TRANSCRIPT OF RECORD

In the

United States Court of Appeals

For the Seventh Circuit

No. 10134

THE UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

NICBO STEEL PRODUCTS, INC.,
Defendant-Appellee.

U. S. C. A.—7
FILED
MAR 15 1950
KENNETH J. CARRICK
CLERK

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

TRANSCRIPT OF RECORD FILED MAR. 3, 1950.
PRINTED RECORD.

In the

United States Court of Appeals

For the Seventh Circuit

No. 10134

THE UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

NICRO STEEL PRODUCTS, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

USCA 2204 The Gunthorp-Warren Printing Co., Chicago—3-14-50—50

INDEX.

Placita	1
Complaint, filed May 21, 1945	2
Order of Substitution, entered Aug. 14, 1946	6
Order of Substitution, entered May 21, 1947	7
Order of Substitution, entered June 9, 1947	8
Motion to Dismiss or Abate, filed Jan. 9, 1950	8
Judgment, entered Jan. 9, 1950	10
Notice of Appeal, filed Feb. 7, 1950	11
Statement of Points	12
Designation of Record	13
Clerk's Certificate	14

Placita. 1

1 Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of January (it being the 2nd day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty and of the Independence of the United States of America, the 174th Year.

Present:

Honorable John P. Barnes, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. LaBuy, District Judge.
Honorable Elwyn R. Shaw, District Judge.
Honorable William H. Holly, District Judge.
Roy H. Johnson, Clerk.
Thomas P. O'Donovan, Marshal.

Monday, January 9, 1950.

Court met pursuant to adjournment.

Present: Honorable Michael L. Igoe, Trial Judge.

2 IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois,

Eastern Division.

Chester Bowles, Administrator, Office of Price Administration, for and on behalf of the United States,
Plaintiff,
vs.
Nicro Steel Products, Inc., a corporation,
Defendant.
No. 45 C 740.

Be It Remembered, that on to-wit, 21st day of May, 1945, the above-entitled action was commenced by the filing of the following Complaint in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to-wit:

3 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—45-C-740) * *

COMPLAINT.

Count I.

1. In the judgment of the Administrator defendant is engaged in acts and practices which constitute violations of Section 4 (a) of the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. A., App. Sec. 901 et seq., as amended by the Stabilization Extension Act of 1944, 58 Stat. 632) in that defendant has violated the provisions of Maximum Price Regulation No. 188 (7 F. R. 5872) as amended, hereinafter referred to as MPR 188, and therefore, pursuant to Section 205 (a) of the Act, the Price Administrator brings this action to enforce compliance with Section 4 (a) of the said Act.

2. Jurisdiction of this action is conferred upon the Court by Section 205 (c) of the Act.

3. At all times mentioned herein there has been in effect MPR 188 issued pursuant to the Act which establishes manufacturers' maximum prices for sales of the commodities hereinafter described.

4. At all times hereinafter mentioned the defendant has been a corporation conducting its business within the jurisdiction of this Court with its principal place of business at 1308 Elston Avenue, in the City of Chicago, County of Cook and State of Illinois within the district and division aforesaid.

4 5. Since August 1, 1942 defendant has been and is now engaged in the manufacture and sale at wholesale of various and sundry pots, skillets, sauce-pans, and other kitchen utensils for which, upon sale by it, maximum prices are and have been established by MPR 188 as amended. Said kitchen utensils are hereinafter referred to as "commodities."

6. Defendant has violated provisions of MPR 188 in the following particulars:

A. Defendant has failed and neglected to prepare on or before July 1, 1942, and thereafter keep for examination a statement, hereinafter referred to as "base period statement," showing the highest prices defendant charged for said commodities delivered by it during March 1942, its offering prices for delivery of said commodities during said month, as appropriate description or identification of each such commodity, and all its customary allowances, discounts and other price differentials, as required by Section 1499.11 of the General Maximum Price Regulation (7 F. R. 3153) which by Section 1499.151 of MPR 188 is incorporated into and made a part of MPR 188.

B. Defendant has failed and neglected to prepare, keep and make available for examination by the Office of Price Administration records showing as precisely as possible the basis upon which defendant determined maximum

5 prices in accordance with the pricing provisions of the aforesaid Regulations for said commodities manufactured and sold by it after May 11, 1942, as required by Section 1499.12 of the General Maximum Price Regulation which by Section 1499.151 of MPR 188 is incorporated into and made a part of MPR 188.

C. Defendant has failed to compute and report to the Office of Price Administration, Washington, D. C., maximum prices as required by Sections 1499.156 and 1499.157 of MPR 188, or to submit to said Office reports applying for

specific authorization for maximum prices as required by Section 1499.158 of MPR 188.

7. Defendant has sold, offered to sell, is now selling and continues to offer and sell said commodities to wholesalers and retailers throughout the United States at prices in excess of those established by said MPR 188, as amended, and will continue to do so unless restrained by this Court.

Count II.

8. Plaintiff, as Administrator of the Office of Price Administration, brings this action for treble damages on behalf of the United States, pursuant to the provisions of Section 205 (e) of the Act.

9. Jurisdiction of this action is conferred upon this Court by Sections 205 (e) and (e) of the Act.

10. Paragraphs 3, 4 and 5 of Count I are incorporated herein by reference as if fully set forth herein.

11. For one year prior to the filing of this complaint the defendant has sold and delivered table and floor lamps and lamp shades at prices in excess of the maximum prices established therefor by MPR 188 as amended.

12. None of the sales referred to in paragraph 11 hereof were made to purchasers for use or consumption other than in the course of its trade and business.

13. The defendant, during the year immediately preceding the filing of this complaint, has demanded and received prices and consideration for said above described commodities in excess of the applicable maximum prices established by MPR 188, as amended.

Wherefore, the Administrator demands:

I. A preliminary and final injunction directed to the defendant, defendant's agents, employees, servants and attorneys, and all other persons in active concert or participation with any of them, jointly and severally:

A. Directing it forthwith,

1. To prepare and keep for examination by any person during ordinary business hours a base period statement as required by Section 1499.11 (b) of the General Maximum Price Regulation, as incorporated into and made a part of MPR 188; and

2. To prepare, keep and make available for examination by the Office of Price Administration records, hereinafter called "current pricing records," required by Section 1499.12 of the General Maximum Price Regulation as incor-

porated into and made a part of MPR 188, showing as precisely as possible the basis upon which defendant determined maximum prices in accordance with the pricing
7 provisions of said Regulations for all commodities sold by defendant after May 11, 1942; and

3. To keep and make available for examination by the Office of Price Administration records of the same kind as it customarily kept, relating to the prices which it charged for commodities sold by it after May 11, 1942, as required by Section 1499.12 of the General Maximum Price Regulation as incorporated and made a part of MPR 188; and

4. To furnish, on or before May 30, 1945, said base period statement and current pricing records, prepared in accordance with Section 1499.151 of MPR 188 to Gilbert Thurston, Price Specialist of the Office of Price Administration, Chicago Metropolitan District Office, Room 514, 222 W. Adams Street, Chicago, Illinois; and

5. To compute and report to the Office of Price Administration, Washington, D. C., as required by Sections 1499.156 and 1499.157 of MPR 188, the maximum prices for commodities manufactured and sold by defendant which were required to be priced under Sections 1499.156 and 1499.157 of MPR 188; and

6. To submit to the Office of Price Administration, Washington, D. C., a report applying for specific authorization of the maximum price, as required by Section 1499.158 of MPR 188, for commodities manufactured and sold by defendant for which the maximum prices cannot be established under Sections 1499.155, 1499.156 or 1499.157 of MPR 188.

8 B. Restraining it from engaging in or causing any of the following acts or omissions to act:

1. Selling, delivering or offering to sell or deliver said commodities unless and until defendant first complies with the directions contained in demands designated "1", "2", "3", "4", "5", and "6" under "A" immediately above; and

2. Directly or indirectly selling, delivering or offering to sell or deliver said commodities at prices in excess of the prices permitted by MPR 188 as heretofore or hereafter amended or any other regulation promulgated by the Office of Price Administration governing the maximum prices of said commodities; and

3. Doing or omitting to do any other act in violation of MPR 188, as heretofore or hereafter amended; and

4. Offering, soliciting, attempting or agreeing to do any of the foregoing.

II. Judgment for and on behalf of the United States against the defendant, Nicro Steel Products, Inc., a corporation, in the sum of three times the amount by which the prices and consideration received by the defendant exceeded the applicable maximum prices established by MPR 188, as amended, during the year immediately preceding the filing of this complaint, and thereafter until final judgment.

III. Such other order, decree or judgment as the Court may deem just and proper to carry out the purposes of the Act, as amended.

Homer C. Clay,
District Enforcement Attorney.

Edward H. Hatton,
Enforcement Attorney.

Jerome H. Dray,
Enforcement Attorney.

And afterwards, to wit, on the 14th day of August, 1946, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES.
(Caption—45-C-740)

ORDER OF SUBSTITUTION OF PUBLIC OFFICER.

This cause came on to be heard on the motion of Paul A. Porter that he, as Administrator of the Office of Price Administration, be substituted as the party-plaintiff in this cause in the place of Chester Bowles, Administrator, Office of Price Administration, his predecessor in office, and it appearing to the court that the said Chester Bowles has resigned as Administrator of the Office of Price Administration, and the said Paul A. Porter has duly succeeded to said office, and is now Administrator of the Office of Price Administration, and that there is substantial need for continuing and maintaining this action against the said defendant herein,

It Is Ordered that Paul A. Porter, Administrator of the Office of Price Administration, be substituted as plaintiff herein in place of said Chester Bowles, without prejudice to the proceedings already had in this cause.

Entered this 14th day of August, 1946.

Igoe,
District Judge.

12 And afterwards, to wit, on the 21st day of May, 1947, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

13 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—45-C-740) * *

It Is Ordered by the Court that Philip B. Fleming, Administrator, Office of Temporary Controls, for and on behalf of the United States, be and he is hereby substituted as party plaintiff herein, in place and stead of Paul A. Porter, Administrator, etc.

14 And afterwards, to wit, on the 9th day of June, 1947, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

15 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—45-C-740) * *

ORDER.

On motion of J. Albert Woll, United States Attorney for the Northern District of Illinois,

It Is Hereby Ordered:

1. That the United States of America is hereby granted leave to substitute as party plaintiff herein;

2. That J. Albert Woll, United States Attorney for the Northern District of Illinois is hereby granted leave to file his appearance herein on behalf of the United States of America.

Enter:

Igoe,
Judge.

Dated at Chicago, Illinois, this 9th day of June, A. D. 1947.

16 And afterwards on, to wit, the 9th day of January, 1950, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Motion to Dismiss or Abate in words and figures following, to wit:

17 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—45-C-740) * *

MOTION TO DISMISS OR ABATE.

Now comes Nicro Steel Products, Inc., a corporation, by Mulcahy, Murphy & Dieringer, its attorneys, and moves the Court to dismiss, or in the alternative, to abate the above entitled cause on the grounds that the said cause is not being prosecuted in the name of, or by the real party in

interest, and in support of said motion, states the following:

1. The above entitled cause was filed herein on December 21, 1945, by Chester Bowles, Administrator, for and on behalf of the United States; the complaint is based upon the Emergency Price Control Act of 1942 (56 Stat. 23) 50 U. S. C. 901 etc.) as amended and extended and Maximum Price Regulation 540, as amended, duly promulgated, pursuant to said Act.

2. On April 25, 1947, the President of the United States promulgated Executive Order 9841 (12 Fed. Reg. 2645), which effective June 1, 1947, terminated the Office of Temporary Control and transferred its functions, with certain exceptions, to the Secretary of Commerce, which order provides that all functions vested in the Temporary Controls Administrator, with certain exceptions, are "'transferred to the Secretary of Commerce and shall be performed by him or subject to his direction and control by such officers or agencies of the Department of Commerce as the Secretary may designate * * *".

18 3. Thereafter, on January 10, 1947, an order was entered by this court substituting the United States of America as party plaintiff therein; however, at no time during this proceeding, has the Secretary of Commerce, the successor to Chester Bowles, Administrator, Office of Price Administration, sought leave to substitute as party plaintiff and has in fact failed within six (6) months after taking office, to satisfactorily show to the court that there is a substantial need for continuing and maintaining this action and to move to be substituted as plaintiff, in conformity with Rule 25B of Federal Rules of Civil Procedure.

4. That Rule 17A of the Federal Rules of Civil Procedure requires that every action shall be prosecuted in the name of the real party in interest and as appears from the foregoing, the real party in interest herein is not the United States of America but is the Secretary of Commerce of the United States who is designated as successor in office in the original plaintiff herein.

Wherefore, defendants move the court that the above entitled cause be dismissed, or in the alternative, be abated.

Nicro Steel Products, Inc., a corporation,
defendant,
By Mulcahy, Murphy & Dieringer,
Its Attorneys.
33 North La Salle Street,
Financial 6-3355.

19 And on the same day, to wit, on the 9th day of January, 1950, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

20 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—45-C-740) * *

ORDER.

This cause coming on to be heard on the motion of Nicro Steel Products, Inc., by Mulcahy, Murphy & Dieringer, its attorneys, to dismiss or abate the above entitled cause, and the Court having examined the motion and heard the arguments of Counsel for both sides and being fully advised in the premises:

It Is Hereby Ordered, that the above cause be dismissed for failure of the Secretary of Commerce, as the real party in interest to substitute as party plaintiff herein, within the time fixed by the Statute.

Enter:

Igoe,
Judge.

21 And afterwards on, to wit, the 7th day of February, 1950, came the Plaintiff, United States of America by its attorneys and filed in the Clerk's office of said Court its certain Notice of Appeal in words and figures following, to wit:

22 IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois,

Eastern Division.

Chester Bowles, Administrator, Office of Price Administration, for and on behalf of the United States, *Plaintiff*, *vs.* Nicro Steel Products, Inc., a Corporation, *Defendant*.	Civil Action No. 45 C 740.

NOTICE OF APPEAL.

To: Mulcahy, Murphy & Dieringer,
Attorneys at Law,
33 North La Salle Street,
Chicago, Iilinois.

Now comes the United States of America by Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and hereby gives Notice of Appeal by the plaintiff in the above-entitled cause to the United States Court of Appeals for the Seventh Circuit from the final Order entered herein dismissing the cause on January 9, 1950.

Otto Kerner, Jr.,
United States Attorney for the Northern District of Illinois, Eastern Division.

Dated: Chicago, Illinois, this 7th day of February, A. D. 1950.

(Certificate of Mailing Attached Hereto:)

23 United States of America,
Northern District of Illinois. } ss.

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that on Feb. 7, 1950, in accordance with Rule 73 (b) of the Federal Rules of Civil Procedure a copy of the foregoing Notice of Appeal was mailed to:

Mulcahy, Murphy & Dieringer,
33 N. La Salle St.,
Chicago, Illinois.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, this 7th day of Feb., A. D. 1950.

Roy H. Johnson,
Clerk.
(Seal)
By Gizella Butcher,
Deputy Clerk.

24 And afterwards on, to wit, the 10th day of February, 1950, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Statement of Points in words and figures following, to wit:

25 IN THE UNITED STATES DISTRICT COURT.
(Caption—45-C-740)

STATEMENT OF POINTS RELIED UPON ON APPEAL.

The United States of America relies upon the following points on appeal.

1. The Court below erred in granting the defendant's Motion to Dismiss, and ordering that the cause be dismissed upon the ground that the United States of America is not a proper party plaintiff.

2. The Court below erred in holding that this action could not be conducted and maintained in the name of the United States, the said ruling being contrary to the pro-

visions of Section 901 of Title 50 United States Code, as amended (Act of July 25, 1946, 60 Stat. 664) and Executive Order No. 9842 issued by the President in pursuance of his authority under the Constitution and statutes of the United States, including Title I of the First War Powers Act, 1941.

3. The Court below erred in failing to hold that the United States is the real party in interest, properly substituted as party plaintiff.

Otto Kerner, Jr.,
United States Attorney.

(Certificate of Mailing Attached But Not Copied:)

26 And on the same day, to wit, the 10th day of February, 1950, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Designation of Record in words and figures following, to wit:

27 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—45-C-740) * *

DESIGNATION OF RECORD.

The United States of America, by Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, designates the following portions of the record to be contained in the record on the appeal of this cause:

1. Complaint filed May 21, 1945.
2. Order entered August 14, 1946, substituting Paul A. Porter for Chester A. Bowles as party plaintiff.
3. Order entered May 21, 1947, substituting Philip B. Fleming as party plaintiff.
4. Order entered June 9, 1947, substituting the United States of America as party plaintiff.
5. Motion to dismiss or abate, filed January 9, 1950.
6. Order entered January 9, 1950, dismissing this cause.
7. Notice of Appeal.
8. Copy of this Designation.
9. Statement of Points Relied Upon on Appeal.
10. Transcript of proceedings had before the Honorable M. L. Igoe on January 6, 1950 and January 9, 1950.

Otto Kerner, Jr.,
United States Attorney.

28 United States of America,
Northern District of Illinois. } ss.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing, together with the Transcript of Proceedings, incorporated and certified this day, in the Transcript of Record on Appeal in the cause entitled: United States of America, Plaintiff *vs.* Allied Oil Corporation, Defendant, No. 44-C-796, to be a true and complete transcript of the proceedings had of record made in accordance with the Designation filed in this Court in the cause entitled: United States of America, Plaintiff *vs.* Nicro Steel Products, Inc., a corporation, Defendant, No. 45-C-740, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 3rd day of March, 1950.

Roy H. Johnson,
Clerk.

(Seal)

By Gizella Butcher,
Deputy Clerk.

67

TRANSCRIPT OF RECORD

In the

United States Court of Appeals

For the Seventh Circuit

No. 10135

THE UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

HARVEY, INC., DOING BUSINESS AS HARVEY, INC., AND HARVEY COMPANY,
Defendants-Appellees.

U. S. C. A.-7
FILED
MAR 15 1950
KENNETH J. CARROLL
CLERK

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

TRANSCRIPT OF RECORD FILED MAR. 3, 1950.
PRINTED RECORD.

In the

United States Court of Appeals

For the Seventh Circuit

No. 10135

THE UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

HARVEY, INC., DOING BUSINESS AS HARVEY, INC., AND HARVEY COMPANY,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

USCA 2204 The Gunthorp-Warren Printing Co., Chicago—3-14-50—50

INDEX.

Placita	1
Complaint, filed Apr. 26, 1946	2
Order of Substitution, entered May 15, 1947	7
Order of Substitution, entered June 9, 1947	7
Motion to Dismiss or Abate, filed Jan. 9, 1950	8
Judgment, entered Jan. 9, 1950	10
Notice of Appeal, filed Feb. 7, 1950	11
Statement of Points	12
Designation of Record	13
Clerk's Certificate	14



1 Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of January (it being the 2nd day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty and of the Independence of the United States of America, the 174th Year.

Present:

Honorable John P. Barnes, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. LaBuy, District Judge.
Honorable Elwyn R. Shaw, District Judge.
Honorable William H. Holly, District Judge.
Roy H. Johnson, Clerk.
Thomas P. O'Donovan, Marshal.

Monday, January 9, 1950.

Court met pursuant to adjournment.

Present: Honorable Michael L. Igoe, Trial Judge.

2 IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois,

Eastern Division.

Paul A. Porter, as Administrator of the Office of Price Administration, for and on Behalf of the United States,
Plaintiff,
vs.
Harvey, Inc., a corporation, doing business as Harvey, Inc., and Harvey Company,
Defendants.
No. 46-C-743.

Be It Remembered, that on to-wit, the 26th day of April, 1946, the above-entitled action was commenced by the filing of the following Complaint in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to-wit:

3 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—46-C-743) * *

COMPLAINT.

Count I.

1. In plaintiff's judgment, the defendant has engaged in acts and practices which constitute violations of Section 4 (a) of the Emergency Price Control Act of 1942 (56 Stat. 23; U. S. C. A. App. Sec. 904), as amended, hereinafter called the Act, in that the defendant has violated Second Revised Maximum Price Regulation No. 215 (8 Fed. Reg. 14145), as amended, General Maximum Price Regulation (7 Fed. Reg. 3153), as amended, and Order No. G-1 issued under the authority of General Order No. 61, as amended.

2. Jurisdiction of this action is conferred upon this Court by Section 205 (e) of the Act.

3. On October 21, 1943, Second Revised Maximum Price Regulation No. 215 became effective, and as amended from time to time, has, continuously since that date, been in effect, establishing maximum prices and invoicing and record keeping provisions with respect to Distribution Yard sales of softwood lumber and hardwood flooring. On May 11, 1942, General Maximum Price Regulation became effective, and as amended from time to time has, continuously since that date, been in fact, establishing maximum prices for the sale of used lumber. On April 2, 1945, General Order No. 61 became effective, and as amended from time to time has, continuously since that date been in effect and authorizes any Regional Administrator of the Office of Price Administration, and any District Director who may be authorized by appropriate Regional Administrator, to issue and put into effect orders establishing area dollars-and-cents ceiling prices for sales of used lumber in any area or locality within his jurisdiction. General Order No. 61 further provides that no person may sell or receive any used lumber at prices higher than the dollars-and-cents ceiling prices fixed by any order issued pursuant to the said General Order No. 61. Pursuant to the authority
4 vested in him and the provisions of General Order No. 61, R. E. Walters, Regional Administrator, Region VI, Office of Price Administration issued Order No. G-1 which became effective on January 1, 1946, and as amended from time to time has continuously since that date, been in effect, establishing maximum prices for sales of used lumber in the Chicago area.

4. The defendant, Harvey, Inc. a corporation, doing business as Harvey, Inc., and Harvey Company, with its office and principal place of business in Chicago, Illinois, was and is at all times hereinafter mentioned, engaged in the business of selling the softwood lumber products and hardwood flooring and used lumber covered by Section Revised Maximum Price Regulation No. 215, as amended, General Maximum Price Regulation, as amended, and Order No. G-1 issued under the authority of General Order No. 61, as amended, and was and is at all times hereinafter mentioned, subject to the provisions of the said Regulation and the Act.

5. Since the effective date of the Second Revised Maximum Price Regulation No. 215, the defendant has failed to prepare, properly prepare, keep, preserve, issue and make available for examination by the Office of Price Administra-

tion, books, records, reports, invoices, and statements as required by said regulation, as originally issued and as amended. Since the effective dates of General Maximum Price Regulation and Order No. G-1, issued under the authority of General Order No. 61, the defendant has failed to prepare, properly prepare, keep, preserve, issue and make available for examination by the Office of Price Administration, books, records, reports, invoices and statements as required by General Maximum Price Regulation and Order No. G-1 issued under the authority of General Order No. 61, as originally issued and as amended.

6. On April 26, 1945, and on divers dates thereafter, the defendant did offer, attempt and agree to sell, solicit sales, sell and deliver softwood lumber products and hardwood flooring and used lumber at prices in excess of the maximum prices established therefor by Second Revised Maximum Price Regulation, No. 215, as amended, General Maximum Price Regulation, as amended, and Order No. G-1, as amended, issued under the authority of General Order No 61, as amended.

Wherefore, the Plaintiff demands:

1. A preliminary and final injunction, or order in the nature thereof, enjoining and requiring the defendant, its officers, agents, servants, employees, attorneys and all persons in active concert or participation with the defendant to prepare, keep, preserve, issue and make available for examination by the Office of Price Administration, books, records, reports, invoices and statements as required by Second Revised Maximum Price Regulation No. 215, as amended, General Maximum Price Regulation, as amended, and Order No. G-1, as amended, issued under the authority of General Order No. 61, as amended, or any other Office of Price Administration regulations and orders, heretofore or hereafter issued, establishing maximum prices for the sales of softwood lumber and hardwood flooring and used lumber, as said regulation and orders were heretofore or shall hereafter be, amended or revised.

2. A preliminary and final injunction, or order in the nature thereof, enjoining the defendant, its officers, agents, servants, employees and all persons in active concert or participation with defendant, from directly or indirectly selling, delivering, offering, soliciting, or attempting to sell or deliver softwood lumber products and hardwood flooring and used lumber at prices in excess of the maximum prices established by Second Revised Maximum Price Regu-

lation No. 215, as amended, General Maximum Price Regulation, as amended, and Order No. G-1, as amended, issued under the authority of General Order No. 61, as amended, and any other Office of Price Administration regulations or orders heretofore, or hereafter issued, establishing maximum prices for the sale of softwood lumber products and hardwood flooring, as said regulations or orders, were heretofore or shall hereafter be amended or revised.

3. Judgment for and on behalf of the United States against the defendant for the costs herein.

4. Such other, further or different relief as to the Court may seem just and proper.

Count II.

1. The Plaintiff, as Administrator of the Office of Price Administration, brings this action for treble damages on behalf of the United States pursuant to the provisions of Section 205 (c) of the Emergency Price Control Act of 1942 (56 Stat. 23; 50 U. S. C. A. App. Sec. 225), enacted January 30, 1942, as amended, said act, as amended, being hereinafter referred to as the Act.

2. Jurisdiction of the action is conferred upon this Court by Section 205 (c) of the Act, and by Section 205 (e) of the Act.

3. Plaintiff repeats and re-alleges paragraphs 3 and 4 of Count I, as paragraphs 3 and 4 of this Count.

5. On April 26, 1945, which is more than six months after the date of the enactment and approval of the Act, and on divers dates thereafter, the defendant sold and delivered softwood lumber products and hardwood flooring and used lumber at prices in excess of the maximum prices established therefore by Second Revised Maximum Price Regulation No. 215, as amended, General Maximum Price Regulation, as amended, and Order No. G-1, as amended, issued under the authority of General Order No. 61, as amended.

6. None of the sales or deliveries referred to in paragraph 5 hereof were made to purchasers other than in the course of trade or business.

Wherefore, the Plaintiff demands:

1. Judgment for and on behalf of the United States against the defendant in the sum of three times the amount by which the softwood lumber products and hardwood flooring and used lumber sold and delivered by the defendant

since April 26, 1945, exceeded the maximum prices established therefore by Second Revised Maximum Price Regulation No. 215, as amended, General Maximum Price Regulation, as amended, and Order No. G-1, as amended, issued under the authority of General Order No. 61, as amended.

2. Judgment for and on behalf of the United States against the defendant for the costs herein.

3. Such other, further and different relief as to the Court may seem just and proper.

Dated: April 26, 1946.

Paul A. Porter,
Administrator, Office of Price Administration.
By Homer C. Clay,
District Enforcement Attorney.

7 William Corrigan,
Chief Litigation Attorney.
*Robert J. Stastny,
Enforcement Attorney.

Office of Price Administration
Chicago Metropolitan Area
222 W. Adams Street
Chicago 6, Illinois
Andover 3600

* To be served with all notices and papers.

8 And afterwards, to wit, on the 15th day of May, 1947, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

9 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—46-C-743) * *

It Is Ordered by the Court that Philip B. Fleming, Administrator, Office of Temporary Controls, Office of Price Administration, for and on behalf of the United States, be and he is hereby substituted as party plaintiff in place and stead of Paul A. Porter, Administrator, etc.

10 And afterwards, to wit, on the 9th day of June, 1947, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

11 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—46-C-743) * *

ORDER.

On motion of J. Albert Woll, United States Attorney for the Northern District of Illinois,

It Is Hereby Ordered:

1. That the United States of America is hereby granted leave to substitute as party plaintiff herein;
2. That J. Albert Woll, United States Attorney for the Northern District of Illinois, is hereby granted leave to file his appearance herein on behalf of the United States of America.

Enter:

Igoe,
Judge.

Dated at Chicago, Illinois, this 9th day of June, A. D. 1947.

12 And afterwards on, to wit, the 9th day of January, 1950, came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Motion To Dismiss Or Abate, in words and figures following, to wit:

13 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—46-C-743) * *

MOTION TO DISMISS OR ABATE.

Now Comes Harvey, Inc., a corporation doing business as Harvey, Inc., and Harvey Company, by Freeman & Freeman, its attorneys, and moves the court to dismiss, or in the alternative to abate the above entitled cause on the ground that the said cause is not being prosecuted in the name of or by the real party in interest, and in support of said motion state the following:

1. The above entitled cause was filed herein on April 26, 1946, by Paul A. Porter, as Administrator of the Office of Price Administration for and on behalf of the United States. The complaint is based upon the Emergency Price Control of 1942 (56 Stat. 23; 50 U. S. C. 901, et seq.) as amended and extended, and Maximum Price Regulation 540 as amended, duly promulgated pursuant to said Act.

2. On April 23, 1947 the President of the United States promulgated Executive Order 9841 (12 Fed. Reg. 2645) which effective June 1, 1947, terminated the Office of Temporary Controls and transferred its functions with certain exceptions to the Secretary of Commerce, which order

14 provides that all functions vested in the Temporary Controls, Administrator, with certain exceptions are "transferred to the Secretary of Commerce and shall be performed by him or subject to his direction and control by such officers or agencies of the Department of Commerce as the Secretary may designate * * *".

3. Thereafter, on June 9, 1947, an order was entered by this Court substituting United States of America as party plaintiff therein: however, at no time during this proceeding has the Secretary of Commerce, the successor to Paul A. Porter, Administrator of the Office of Price Administration, sought leave to substitute as party plaintiff, and has in fact failed within six months after taking office to satisfactorily show to the Court that there is a substantial need

for continuing and maintaining this action and to move to be substituted as plaintiff in conformity with Rule 25d of the Federal Rules of Civil Procedure.

4. That Rule 17a of the Federal Rules of Civil Procedure requires that every action shall be presented in the name of the real party in interest, and as appears from the foregoing the real party in interest herein is not the United States of America but is the Secretary of Commerce of the United States who is designated as successor in office to the original plaintiff herein.

Wherefore, defendant moves the Court that the above entitled cause be dismissed or in the alternative abated.

Harvey, Inc., a corporation, doing business as Harvey, Inc., and Harvey Company,

Defendant,

By Freeman & Freeman,
Its Attorneys,
1 North La Salle Street,
St. 2-0339.
Earl Freeman.

82

15 And on the same day, to wit, on the 9th day of January, 1950, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

16 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—46-C-743) * *

ORDER.

This Cause coming on to be heard upon the motion of Harvey, Inc., a corporation, doing business as Harvey, Inc., and Harvey Company, by its attorneys, Freeman & Freeman, for an order to dismiss or in the alternative to abate the above entitled cause, and a written motion having been presented setting forth the reasons therefor, and the court being fully advised in the premises,

It Is Hereby Ordered that the said motion of defendant be and it is hereby sustained and that this cause be and it is hereby dismissed.

Enter:

Igoe,
Judge.

Dated: Chicago, Illinois, January 9th, 1950.

17 And afterwards on, to wit, the 7th day of February, 1950, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Notice Of Appeal, in words and figures following, to wit:

18 IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois,

Eastern Division.

United States of America, *Plaintiff,*
vs.
Harvey, Inc., a corporation, etc., *et al.*, *Defendants.*
No. 46-C-743.

NOTICE OF APPEAL.

To: Freeman and Freeman, 1 North La Salle Street, Chicago, Illinois:

Now comes the United States of America, by Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and hereby gives notice of appeal by the plaintiff in the above-entitled cause to the United States Court of Appeals for the Seventh Circuit from the final order entered herein, dismissing the cause on January 9, 1950.

Otto Kerner, Jr.,
United States Attorney.

(Certificate of Mailing Attached Hereto.)

19 United States of America,
Northern District of Illinois. } ss.

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that on February 7, 1950, in accordance with Rule 73 (b) of the Federal Rules of Civil Procedure a copy of the foregoing Notice of Appeal was mailed to:

Freeman & Freeman,
1 N. La Salle St.,
Chicago, Illinois.

In Testimony Whereof, I have hereunto subsqcribed my name and affixed the seal of the aforesaid Court at Chicago, this 7th day of February, A. D. 1950.

Roy H. Johnson,
Clerk,
(Seal) By Gizella Butcher,
Deputy Clerk.

20 And afterwards on, to wit, the 10th day of February, 1950, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Statement Of Points, in words and figures following, to wit:

21 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—46-C-743) * *

STATEMENT OF POINTS RELIED UPON ON APPEAL.

The United States of America relies upon the following points on appeal:

1. The Court below erred in granting the defendants' Motion to Dismiss, and ordering that the cause be dismissed upon the ground that the United States of America is not a proper party plaintiff.

2. The Court below erred in holding that this action could not be conducted and maintained in the name of the

United States, the said ruling being contrary to the provisions of Section 901 of Title 50 United States Code, as amended (Act of July 25, 1946, 60 Stat. 664) and Executive Order No. 9842 issued by the President in pursuance of his authority under the Constitution and statutes of the United States, including Title I of the First War Powers Act, 1941.

3. The Court below erred in failing to hold that the United States is the real party in interest, properly substituted as party plaintiff.

Otto Kerner, Jr.,
United States Attorney.

(Certificate of Mailing Attached But Not Copied.)

22 And on the same day, to wit, the 10th day of February, 1950, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Designation Of Record, in words and figures following, to wit:

23 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—46-C-743) * *

DESIGNATION OF RECORD.

The United States of America, by Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, designates the following portions of the record to be contained in the record on the appeal of this cause:

1. Complaint filed April 26, 1946.
2. Order entered May 15, 1947, substituting Philip B. Fleming as party plaintiff.
3. Order entered June 9, 1947, substituting the United States of America as party plaintiff.
4. Motion to dismiss, filed January 9, 1950.
5. Order entered January 9, 1950, dismissing this cause.
6. Notice of Appeal.
7. Copy of this Designation.
8. Statement of Points Relied Upon on Appeal.
9. Transcript of proceedings had before the Honorable Michael L. Igoe on January 6, 1950, and January 9, 1950.

Otto Kerner, Jr.,
United States Attorney.

24 United States of America,
Northern District of Illinois. } ss.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing, together with the Transcript of Proceedings incorporated and certified this day in the Transcript of Record on Appeal, in the cause entitled: United States of America, Plaintiff *vs.* Allied Oil Corporation, Defendant, No. 44-C-796, to be a true and complete transcript of the proceedings had of record made in accordance with the Designation filed in this Court in the cause entitled: United States of America, Plaintiff, Harvey, Inc., a corporation, etc., et al., Defendants, No. 46-C-743, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 3rd day of March, 1950.

(Seal)

Roy H. Johnson,
Clerk,
By Gizella Butcher,
Deputy Clerk.

INDEX.

Placita	1
Complaint, filed Dec. 3, 1946	2
Order of Substitution, entered Mar. 5, 1947	5
Order of Substitution, entered June 10, 1947	5
Motion to Dismiss or Abate, filed Jan. 9, 1950	6
Judgment, entered Jan. 9, 1950	8
Notice of Appeal, filed Feb. 7, 1950	9
Statement of Points	10
Designation of Record	11
Clerk's Certificate	12

In the

United States Court of Appeals

For the Seventh Circuit

No. 10137

THE UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

EVA METNICK, DOING BUSINESS AS COUNTY DISTRIBUTORS, HARRY METNICK, MORRIS METNICK, JOE SILVA AND JACK METNICK,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

The Gunthorp-Warren Printing Co., Chicago—3-14-56—50

1 Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of January (it being the 2nd day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty and of the Independence of the United States of America, the 174th Year.

Present:

Honorable John P. Barnes, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. La Buy, District Judge.
Honorable Elwyn R. Shaw, District Judge.
Honorable William H. Holly, District Judge.
Roy H. Johnson, Clerk.
Thomas P. O'Donovan, Marshal.

Monday, January 9, 1950.

Court met pursuant to adjournment.

Present: Honorable Michael L. Igoe, Trial Judge.

2 IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois,

Eastern Division.

Paul A. Porter, Administrator, Office of the Price Administration, for and on behalf of the United States,
Plaintiff,
vs.
Eva Metnick, doing business as County Distributors, Harry Metnick, Morris Metnick, Joe Silva and Jack Metnick,
Defendants.
} No. 46-C-1986.

Be It Remembered, that on to-wit, the 3rd day of December, 1946, the above-entitled action was commenced by the filing of the following Complaint in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to-wit:

3 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—46-C-1986) * *

Part I.

Now comes the plaintiff and for cause of action against said defendant alleges and shows:

1. Plaintiff is the duly qualified, appointed and acting Administrator of the Office of Price Administration.

2. That at all times pertinent hereto, there was and still is in effect an act known as the Emergency Price Control Act of 1942, as amended and extended, (56 Stat. 23; 56 Stat. 765; 56 Stat. 632; 50 U. S. C. A. App. Ser. 901 et seq.;) Act of July 25, 1946, Public Law 548, Ch. 671 of the 79th Congress, Second Session, hereinafter referred to as the Act, and, duly promulgated pursuant to said Act, Maximum Price Regulation 540 (10 F. R. 1383).

This action is brought pursuant to Sect. 205 (E) of the Act to enforce compliance with said Act and said Regulations and Orders issued thereunder. Jurisdiction of this action is conferred upon this Court by Section 205 (e) of the Act.

3. That at all times mentioned herein, the defendant(s) named in the caption hereof, within the jurisdiction of this Court, did business under the name and at the address set forth below, buying, selling and handling, among others, the commodities or services indicated, which are the subject of this action and the prices, receipt, transfer and handling of which are controlled by said acts and regulations:

Name: Eva Metnick, d/b/a County Distributors, Harry Metnick, Morris Metnick, Joe Silva, and Jack Metnick.
Address: 2739 West Madison Street.
City and State: Chicago, Illinois.
Commodities: Used passenger automobiles.

Count I.

(Treble Damages—Open End)
(Sales to Consumers)

1. The allegations of Part I, paragraphs 1, 2, and 3 are incorporated herewith as being herein set forth in full.

2. From December 1, 1945 to November 9, 1946 defendant sold said commodities covered by said Regulation to divers persons, at prices higher than the maximum prices established by the Act and said Regulation.

3. More than 30 days have elapsed since the occurrence of the aforementioned overcharges and the said divers persons so overcharged have not instituted any action for damages on account of such overcharges within 30 days of the date thereof pursuant to Section 205 (e) of the Act.

4 Wherefore, plaintiff prays:

1. That a judgment be entered for and on behalf of the United States against the defendants, in the sum of three times the amount by which the defendants' said price charges exceeded the applicable maximum price legally required by the Regulation; and that payment of the judgment herein be made as follows:

(a). Restitution of the actual amount overcharged to

each person who has been overcharged as aforesaid, by delivering said payments to the plaintiff; then the said payments to be delivered by the plaintiff to the said persons who have been overcharged as aforesaid; and

(b) The balance of the amount of the judgment herein to be paid to the plaintiff, payable to the order of the Treasurer of the United States.

2. That the costs of this action be taxed against the defendants by said judgment.

3. That such other and further relief be granted as the Court may deem just and proper.

Dated, Chicago, Illinois, this 26 day of November, 1946.

Paul A. Porter,
Administrator, Office of Price Administration, Chicago Metropolitan Area.
By: William J. Corrigan,
District Enforcement Attorney.
Joseph B. Kovarick,
Enforcement Attorney.
Vincent P. Clohisy,
Enforcement Attorney.

Count II.

(Treble Damages)
(Sales in Course of Trade or Business)

1. The allegations of Part I, paragraphs 1, 2 and 3 are incorporated herein as if herein set forth in full.

2. Between the date of December 1, 1945 and the date of November 9, 1946, defendant sold said commodities covered by said Regulation to divers purchasers, and payment was received therefor, at prices in excess of the maximum prices established by the Act and said Regulation.

3. That none of said sales were made to purchasers for their own use or consumption other than in the course of trade or business.

5 And afterwards, to wit, on the 5th day of March, 1947, being one of the days of the regular March term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

6 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—46-C-1986) * *

On stipulation of the parties by counsel filed herein

It Is Ordered that Philip B. Fleming, Administrator, Office of Temporary Controls, for and on behalf of the United States, be and he is hereby substituted as party plaintiff in place and stead of Paul A. Porter, Administrator, etc.

7 And afterwards, to wit, on the 10th day of June, 1947, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Elwyn R. Shaw, District Judge, appears the following entry to wit:

8 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—46-C-1986) * *

ORDER.

On motion of J. Albert Woll, United States Attorney for the Northern District of Illinois,

It Is Hereby Ordered:

1. That the United States of America is hereby granted leave to substitute as party plaintiff herein;

2. That J. Albert Woll, United States Attorney for the Northern District of Illinois is hereby granted leave to file his appearance herein on behalf of the United States of America.

Enter:

Shaw,

Judge.

Dated at Chicago, Illinois, this 10th day of June, A. D. 1947.

9 And afterwards on, to wit, the 9th day of January, 1950 came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Motion To Dismiss Or Abate in words and figures following to wit:

10 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—46-C-1986) • •

MOTION TO DISMISS OR ABATE.

Now comes Eva Metnick, doing business as County Distributors, Harry Metnick, Morris Metnick, Joe Silva and Jack Metnick, by Milton T. Raynor, their attorney, and move the Court to dismiss, or in the alternative to abate the above-entitled cause on the ground that the said cause is not being prosecuted in the name of or by the real party in interest, and in support of said motion state the following:

1. The above-entitled cause was filed herein on December 3, 1946, by Paul A. Porter, Administrator, for and on behalf of the United States. The complaint is based upon the Emergency Price Control of 1942 (56 Stat. 23; 50 U. S. C. 901 et seq.) as amended and extended, and Maximum Price Regulation 540, as amended, duly promulgated pursuant to said Act. On the 4th day of March, 1947, Philip B. Fleming, Administrator, Office of Temporary Controls, was substituted as party plaintiff, in place of Paul A. Porter.

11 2. On April 23, 1947, the President of the United States promulgated Executive Order 9841 (12-Fed. Reg. 2645), which effective June 1, 1947, terminated the Office of Temporary Controls and transferred its functions with certain exceptions to the Secretary of Commerce, which order provides that all functions vested in the Temporary Controls Administrator, with certain exceptions, are "transferred to the Secretary of Commerce and shall be performed by him or subject to his direction and control by such officer or agencies of the Department of Commerce as the Secretary may designate • • •."

3. Thereafter, on June 10, 1947, an order was entered by this Court substituting United States of America as party plaintiff therein; however, at no time during this proceeding, has the Secretary of Commerce, the successor

to Philip B. Fleming, Administrator, Office of Temporary Controls, sought leave to substitute as party plaintiff and has in fact failed within six (6) months after taking office to satisfactorily show to the Court that there is a substantial need for continuing and maintaining this action and to move to be substituted as plaintiff, in conformity with Rule 25d of Federal Rules of Civil Procedure.

4. That Rule 17A of the Federal Rules of Civil Procedure requires that every action shall be prosecuted in the name of the real party in interest and as appears from the foregoing, the real party in interest herein is not the United States of America but is the Secretary of Commerce of the United States who is designated as successor in office to the plaintiff herein.

Wherefore, defendants move the court that the above-entitled cause be dismissed, or in the alternative be abated.

Eva Metnick, doing business as County Distributors, Harry Metnick, Morris Metnick, Joe Silva and Jack Metnick,

Defendants,

By Milton T. Raynor,
Their Attorney,
33 N. La Salle St.,
Sta. 2-7747.

Received a copy of the foregoing Motion to Dismiss or Abate this 9th day of January, 1950.

Otto Kerner, Jr.,
United States Attorney.

13 And on the same day, to wit, on the 9th day of January, 1950, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

14 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—46-C-1986) * *

ORDER.

Now comes the defendants, Eva Metnick, doing business as County Distributors, Harry Metnick, Morris Metnick, Joe Silva and Jack Metnick, by their attorney, Milton T. Raynor, due notice having been served on the plaintiff and full arguments having been heard in open court, the court having jurisdiction of the parties and the subject matter and being fully advised in the premises;

It Is Hereby Ordered and Decreed that the above entitled matter be dismissed, by virtue of the fact that the United States of America, plaintiff herein is not a proper party plaintiff.

Enter:

Igoe,
Judge.

Dated at Chicago, Illinois, this 9th day of January, 1950.

15 And afterwards on, to wit, the 7th day of February, 1950 came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Notice of Appeal in words and figures following, to wit:

16 IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois,

Eastern Division.

United States of America, *Plaintiff,* *vs.* Eva Metnick, doing business as County Distributors, Harry Metnick, Morris Metnick, Joe Silva and Jack Metnick, *Defendants.*	Civil Action 46 C 1986.

NOTICE OF APPEAL.

To:

Mr. Milton T. Raynor,
Attorney At Law,
33 North La Salle Street,
Chicago, Illinois.

Now comes the United States of America by Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and hereby gives Notice of Appeal by the plaintiff in the above-entitled cause to the United States Court of Appeals for the Seventh Circuit from the final Order entered herein dismissing the cause of Janaury 9, 1950.

Otto Kerner, Jr.,
United States Attorney for the Northern District of Illinois, Eastern Division.

Dated: Chicago, Illinois, this 7th day of February, A. D. 1950.

(Certificate of Mailing Attached Hereto.)

17 United States of America, }
Northern District of Illinois. } ss.

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that on February 7, 1950, in accordance with Rule 73(b) of the Federal Rules of Civil Procedure a copy of the foregoing Notice of Appeal was mailed to

Mr. Milton T. Raynor,
33 N. La Salle St.,
Chicago, Illinois.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, this 7th day of February, A. D., 19 ....

Roy H. Johnson,
Clerk,
By Gizella Butcher,
(Seal) *Deputy Clerk.*

18 And afterwards on, to wit, the 10th day of February, 1950 came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Statement Of Points in words and figures following, to wit:

19 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—46-C-1986) • •

STATEMENT OF POINTS RELIED UPON ON APPEAL.

The United States of America relies upon the following points on appeal:

1. The Court below erred in granting the defendants' Motion to Dismiss, and ordering, that the cause be dismissed upon the ground that the United States of America is not a proper party plaintiff.

2. The Court below erred in holding that this action could not be conducted and maintained in the name of the United States, the said ruling being contrary to the pro-

visions of Section 901 of Title 50 United States Code, as amended (Act of July 25, 1946, 60 Stat. 664) and Executive Order No. 9842 issued by the President in pursuance of his authority under the Constitution and statutes of the United States, including Title I of the First War Powers Act, 1941.

3. The Court below erred in failing to hold that the United States is the real party in interest, properly substituted as party plaintiff.

Otto Kerner, Jr.,
United States Attorney.

(Affidavit of Mailing Attached But Not Copied.)

20 And on the same day, to wit, the 10th day of February, 1950 came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Designation Of Record in words and figures following, to wit:

21 IN THE UNITED STATES DISTRICT COURT.
(Caption—46-C-1986)

DESIGNATION OF RECORD.

The United States of America, by Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, designates the following portions of the record to be contained in the record on the appeal of this cause:

1. Complaint filed December 3, 1946.
2. Order entered March 5, 1947, substituting Philip B. Fleming as party plaintiff.
3. Order entered June 10, 1947, substituting the United States of America as party plaintiff.
4. Motion to Dismiss or Abate, filed January 9, 1950.
5. Order entered January 9, 1950, dismissing this cause.
6. Notice of Appeal.
7. Copy of this Designation.
8. Statement of Points Relied Upon on Appeal.
9. Transcript of proceedings before the Honorable Michael L. Igoe on January 6, 1950 and January 9, 1950.

Otto Kerner, Jr.,
United States Attorney.

22 United States of America,
Northern District of Illinois. } ss:

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing, together with the Transcript of Proceedings, incorporated and certified this day in the Transcript of record on Appeal, in the cause entitled United States of America, Plaintiff *vs.* Allied Oil Corporation, Defendant, No. 44-C-796, to be a true and complete transcript of the proceedings had of record made in accordance with the Designation filed in this Court in the cause entitled: United States of America, Plaintiff *vs.* Eva Metnick, doing business as County Distribtuors, et al., Defendants, No. 46-C-1986, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 3rd day of March, 1950.

Roy H. Johnson,
Clerk,
By Gizella Butcher,
Deputy Clerk.

(Seal)

TRANSCRIPT OF RECORD

In the

United States Court of Appeals

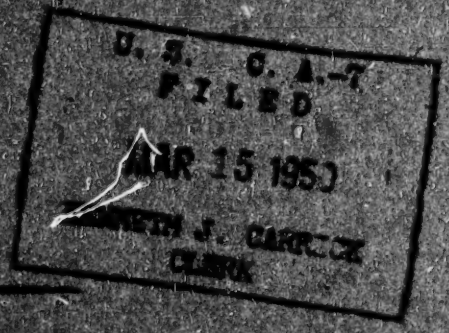
For the Seventh Circuit

No. 10139

THE UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

JACK STEIN AND HARRY ROBINS, INDIVIDUALLY AND DOING BUSINESS AS BOULEVARD MOTOR SALES,
Defendants-Appellees.



Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

TRANSCRIPT OF RECORD FILED MAR. 3, 1950.
PRINTED RECORD.



In the

United States Court of Appeals

For the Seventh Circuit

No. 10139

THE UNITED STATES OF AMERICA,
Plaintiff-Appellant.

vs.

JACK STEIN AND HARRY ROBINS, INDIVIDUALLY AND DOING BUSINESS AS BOULEVARD MOTOR SALES,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

USCA 2204 The Gunthorp-Warren Printing Co., Chicago—3-14-50—50

INDEX.

Placita	1
Complaint, filed Apr. 15, 1947	2
Order extending time to Answer, entered May 22, 1947	5
Order of Substitution, entered June 9, 1947	5
Order re: Brief and trial, entered Oct. 29, 1947	6
Order re: trial, entered Feb. 4, 1948	6
Order re: trial, entered May 25, 1948	6
Order re: trial, entered Sept. 30, 1948	7
Order re: trial, entered Jan. 20, 1949	7
Order re: trial, entered Apr. 11, 1949	7
Order re: trial, entered June 13, 1949	8
Order re: trial, entered Oct. 6, 1949	8
Order re: trial, entered Dec. 7, 1949	8
Motion to dismiss or abate, filed Jan. 9, 1950	9
Judgment, entered Jan. 9, 1950	10
Notice of Appeal, filed Feb. 7, 1950	12
Statement of Points	13
Designation of Record	14
Additional Designation of Record	15
Clerk's Certificate	16

1 Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of January (it being the 2nd day thereof) in the Year of Our Lord One Thousand Nine Hundred and Fifty and of the Independence of the United States of America, the 174th Year.

Present:

Honorable John P. Barnes, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. LaBuy, District Judge.
Honorable Elwyn R. Shaw, District Judge.
Honorable William H. Holly, District Judge.
Roy H. Johnson, Clerk.
Thomas P. O'Donovan, Marshal.

Monday, January 9, 1950.

Court met pursuant to adjournment.

Present: Honorable Michael L. Igoe, Trial Judge.

2 IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois,

Eastern Division.

Philip B. Fleming, Administrator, Office of Temporary Controls, Office of Price Administration, for and on behalf of the United States,

Plaintiff,

vs.

Jack Stein, and Harry Robins, individually and doing business as Boulevard Motor Sales,

Defendant.

No. 47-C-604.

Be It Remembered, that on to-wit, the 15th day of April, 1947, the above-entitled action was commenced by the filing of the following Complaint in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to-wit:

3 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—47-C-604) * *

COMPLAINT.

Now comes the Plaintiff and for cause of action against said Defendants alleges and shows:

1. Plaintiff is the duly qualified, appointed and acting Anministrator of the Office of Temporary Controls, Office of Price Administration.

2. That at all times pertinent hereto, there was and still is in effect an act known as the Emergency Price Control Act of 1942 (56 Stat. 23; 50 U. S. C. App. Sec. 901 *et seq.*), as amended and extended, hereinafter referred to as the Act, and duly promulgated pursuant to said Act, Maximum Price Regulation 540 (9 F. R. 6434), as amended, said Regulation being effective during all times material herein. This action is brought pursuant to Sect. 205 (e) of the Act to enforce compliance with said Act and said

Regulations and Orders issued thereunder. Jurisdiction of this Action is conferred upon this Court by Section 205 (c) of the Act.

3. That at all times mentioned herein, the Defendants named in the caption hereof, within the jurisdiction of this Court, did business under the name and at the address set forth below, buying, selling and handling, among others, the commodities or services indicated, which are the subject of this action and the prices, receipt, transfer and handling of which are controlled by said Act and said Regulations:

Name: Jack Stein and Harry Robins, individually and d/b/a Boulevard Motor Sales.
Address: 2411 South Michigan Avenue.
City and State: Chicago, Illinois.
Commodity: Used Cars.

4 Count I.

(Treble Damages—Open End)
(Sales to Consumers)

1. The allegations of Part I, paragraphs 1, 2, and 3 are incorporated herewith as being herein set forth in full.

2. From April 15, 1946, to November 10, 1946, Defendants sold said commodities covered by said Regulation to divers persons, at prices higher than the maximum prices established by the Act and said Regulation.

3. More than 30 days have elapsed since the occurrence of the aforementioned overcharges and the said divers persons so overcharged have not instituted any action for damages on account of such overcharges within 30 days of the date thereof pursuant to Section 205 (e) of the Act.

Count II.

(Treble Damages)
(Sales in Course of Trade or Business)

1. The allegations of Part I, paragraphs 1, 2 and 3 are incorporated herein as if herein set forth in full.

2. Between the date of April 15, 1946, and the date of November 10, 1946, Defendants sold said commodities covered by said Regulation to divers purchasers, and payment was received therefor, at prices in excess of the

maximum prices established by the Act and said Regulation.

3. That none of said sales were made to purchasers for their own use or consumption other than in the course of trade or business.

Wherefore, the Plaintiff demands:

A. Judgment for the Plaintiff to recover of the Defendants treble the total amounts received by the Defendants from purchasers of the used cars involved in this Complaint, which were in excess of the maximum prices established by the Act and Regulation 540, as amended, issued thereunder, and further that;

B. The Defendants be ordered and directed:

To tender to such persons as are entitled thereto a refund of all the amounts which were in excess of the maximum prices established by the Act and Maximum Price Regulation 540, as amended, issued thereunder, which were received by the Defendants from purchasers of the used cars involved in this Complaint, provided that refunds made by the Defendants to such purchasers, in compliance with the directions of the Court for overcharges within one year prior to the bringing of this action, shall be deducted from the amount of the Judgment prayed for in the preceding paragraph "A".

Philip B. Fleming, Administrator, Office of Temporary Controls Office of Price Administration,

By: Isadore L. Kovitz,
Regional Enforcement Executive,
William J. Corrigan,
Attorney in Charge Chicago Branch Office,
George A. Hall,
Chief Review and Disposition Section Chicago Branch Office,
Edwin A. Dvorak,
Enforcement Attorney.
Attorneys for the Plaintiff, Office of Temporary Controls, Office of Price Administration,
Chicago Branch Office,
226 West Jackson Boulevard,
Chicago 6, Illinois,
ANdover 3600,
Extension 425.

6 And afterwards, to wit, on the 22nd day of May, 1947, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

7 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—47-C-604) * *

On motion of the defendants by counsel

It Is Ordered that the time of said defendants within which to answer or otherwise plead be and it is hereby extended for a period of twenty (20) days from this date.

8 And afterwards, to wit, on the 9th day of June, 1947, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

9 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—47-C-604) * *

ORDER.

On motion of J. Albert Woll, United States Attorney for the Northern District of Illinois,

It Is Hereby Ordered:

1. That the United States of America is hereby granted leave to substitute as party plaintiff herein;

2. That J. Albert Woll, United States Attorney for the Northern District of Illinois is hereby granted leave to file his appearance herein on behalf of the United States of America.

Enter;

Igoe,

Judge.

Dated at Chicago, Illinois, this 9th day of June, A. D. 1947.

10 And afterwards, to wit, on the 29th day of October, 1947, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

11 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—47-C-604) * *

On motion of the plaintiff by the United States Attorney it is

Ordered that the plaintiff be and it is hereby given twenty (20) days from this date within which to file brief and that this cause be and it is hereby set for trial on February 4, 1948.

12 And afterwards, to wit, on the 4th day of February, 1948, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

13 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—47-C-604) * *

On motion of the plaintiff by counsel it is

Ordered that this cause be and it is hereby reset for trial on May 25, 1948.

14 And afterwards, to wit, on the 25th day of May, 1948, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

15 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—47-C-604) * *

On agreement of the parties by counsel now made in open Court it is

Ordered that this cause be and it is hereby reset for trial to September 30, 1948.

16 And afterwards, to wit, on the 30th day of September, 1948, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

17 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—47-C-604) * *

On motion of the plaintiff by the United States Attorney it is

Ordered that this cause be and it is hereby reset for trial to January 20, 1949.

18 And afterwards, to wit, on the 20th day of January, 1949, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

19 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—47-C-604) * *

On motion of the plaintiff by the United States Attorney it is

Ordered that this cause be and it is hereby continued for trial to April 11, 1949, before the Honorable Michael L. Igoe, one of the Judges of this Court.

20 And afterwards, to wit, on the 11th day of April, 1949, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

21 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—47-C-604) * *

It Is Ordered by the Court that this cause be and it is hereby reset for trial to June 13, 1949.

22 And afterwards, to wit, on the 13th day of June, 1949, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

23 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—47-C-604) * *

On agreement of the parties by counsel now made in open Court it is

Ordered that this cause be and it is hereby reset for trial to October 6, 1949.

24 And afterwards, to wit, on the 6th day of October, 1949, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

25 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—47-C-604) * *

On motion of the plaintiff by the United States Attorney it is

Ordered that this cause be and it is hereby reset for trial to December 7, 1949.

26 And afterwards, to wit, on the 7th day of December, 1949, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

27 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—47-C-604) * *

On the Court's own motion it is

Ordered that this cause be and it is hereby continued for trial to January 6, 1950.

28 And afterwards on, to wit, the 9th day of January, 1950, came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Motion to Dismiss or Abate in words and figures following, to wit:

29 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—47-C-604) * *

MOTION TO DISMISS OR ABATE.

Now come Jack Stein and Harry Robins, individually and doing business as Boulevard Motor Sales, defendants, by Sherwin & Sherwin, their attorneys, and move the court to dismiss, or in the alternative to abate the above entitled cause on the ground that the said cause is not being prosecuted in the name of or by the real party in interest, and in support of said motion state the following:

1. The above-entitled cause was filed herein on April 15, 1947 by Philip B. Fleming, Administrator, Office of Temporary Controls, Office of Price Administration, for and on behalf of the United States. The complaint is based upon the Emergency Price Control of 1942 (56 Stat. 23; 50 U.S.C. 901, *et seq.*) as amended and extended, and Maximum Price Regulation 540 as amended, duly promulgated pursuant to said Act.

2. On April 23, 1947 the President of the United States promulgated Executive Order 9841 (12 Fed. Reg. 2645) which effective June 1, 1947 terminated the Office of Temporary Controls and transferred its functions with certain exceptions to the Secretary of Commerce, which order provides that all functions vested in the Temporary Controls Administrator, with certain exceptions are "transferred to the Secretary of Commerce and shall be
30 performed by him or subject to his direction and control by such officers or agencies of the Department of Commerce as the Secretary may designate * * *".

3. Thereafter, on June 9, 1947, an order was entered by this court substituting United States of America as party plaintiff therein; however, at no time during this proceeding has the Secretary of Commerce, the successor to Philip B. Fleming, Temporary Controls Administrator, sought leave to substitute as party plaintiff, and has in

fact failed within six months after taking office to satisfactorily show to the Court that there is a substantial need for continuing and maintaining this action and to move to be substituted as plaintiff in conformity with Rule 25d of the Federal Rules of Civil Procedure.

4. That Rule 17a of the Federal Rules of Civil Procedure requires that every action shall be prosecuted in the name of the real party in interest, and as appears from the foregoing the real party in interest herein is not the United States of America but is the Secretary of Commerce of the United States who is designated as successor in office to the original plaintiff herein.

Wherefore defendants move the Court that the above-entitled cause be dismissed, or in the alternative be abated.

Jack Stein and Harry Robins, individually and doing business as Boulevard Motor Sales, defendants.
By Sherwin & Sherwin, *their Attorneys.*
209 South La Salle St. CE 6-2010
Chicago
Theodore R. Sherwin.

Received a copy of the foregoing Motion to Dismiss or Abate this ..... day of January, 1950.

Otto Kerner, Jr.
United States Attorney.

31 And on the same day, to wit, on the 9th day of January, 1950, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

32 In the District Court of the United States.
* * (Caption—47-C-604) * *

ORDER.

This Cause coming on to be heard on the motion of the defendants, Jack Stein and Harry Robins to dismiss the above entitled cause on the ground that the said cause is not being prosecuted in the name of or by the real party in interest, due notice having been given to all parties of

record, and the court having heard the arguments of counsel, and being fully advised in the premises, Finds:

1. The above entitled cause was filed herein on April 15, 1947 by Philip B. Fleming, Administrator, Office of Temporary Controls, Office of Price Administration, for and on behalf of the United States. The complaint is based upon the Emergency Price Control of 1942 (56 Stat. 23; 50 U.S.C. 901, *et seq.*) as amended and extended, and Maximum Price Regulation 540 as amended, duly promulgated pursuant to said Act.

2. On April 23, 1947 the President of the United States promulgated Executive Order 9841 (12 Fed. Reg. 2645) which effective June 1, 1947 terminated the Office of Temporary Controls and transferred its functions with certain exceptions to the Secretary of Commerce, which order provides that all functions vested in the Temporary Controls Administrator, with certain exceptions are "transferred to the Secretary of Commerce and shall be per-
33 formed by him or subject to his direction and control by such officers or agencies of the Department of Commerce as the Secretary may designate * * *"

3. On June 9, 1947, an order was entered by this Court substituting United States of America as party plaintiff therein:

4. At no time during this proceeding has the Secretary of Commerce, the successor to Philip B. Fleming, Temporary Controls Administrator, sought leave to substitute as party plaintiff, and he has in fact failed within six months after taking offices to satisfactorily show to the Court that there is a substantial need for continuing and maintaining this action and to move to be substituted as plaintiff in conformity with Rule 25d of the Federal Rules of Civil Procedure.

5. The United States of America is not the real party in interest and therefore cannot properly prosecute this action, the real party in interest being the Secretary of Commerce of the United States. The said Secretary of Commerce having failed to move to be substituted as plaintiff in conformity with Rule 25d, the above entitled cause is therefore abated.

It Is Therefore Hereby Ordered, Adjudged and Decreed that the above entitled cause be and it is hereby dismissed.

Enter:

January 9, 1950

Igoe,
Judge.

34 And afterwards on, to wit, the 7th day of February, 1950, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Notice of Appeal in words and figures following, to wit:

35 IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois,

Eastern Division.

United States of America,
Plaintiff,
vs.
Jack Stein, *et al.*,
Defendants.
} 47 C 604.

NOTICE OF APPEAL.

To: Sherwin and Sherwin,
Attorneys at Law,
209 South La Salle Street,
Chicago, Illinois.

Now comes the United States of America by Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and hereby gives Notice of Appeal by the plaintiff in the above-entitled cause to the United States Court of Appeals for the Seventh Circuit from the final Order entered herein dismissing the cause on January 9, 1950.

Otto Kerner, Jr.,
United States Attorney, for the Northern District of Illinois, Eastern Division.

Dated: Chicago, Illinois, this 7th day of February, A. D. 1950.

(Certificate of mailing attached but not copied.)

36 United States of America,
Northern District of Illinois. } ss.

Certificate of Mailing.

I, Roy H. Johnson, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that on February 7, 1950, in accordance with Rule 73 (b) of the Federal Rules of Civil Procedure a copy of the foregoing Notice of Appeal was mailed to

Sherwin & Sherwin,
209 S. La Salle St.,
Chicago, Illinois.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, this 7th day of February, A. D., 1950.

Roy H. Johnson,
(Seal) *Clerk.*
By Gizella Butcher,
Deputy Clerk.

37 And afterwards on, to wit, the 10th day of February, 1950 came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Statement of Points in words and figures following, to wit:

38 In the United States District Court.
* * (Caption—47-C-604) * *

STATEMENT OF POINTS RELIED UPON ON APPEAL.

The United States of America relies upon the following points on appeal:

1. The Court below erred in granting the defendants' Motion to Dismiss, and ordering that the cause be dismissed upon the ground that the United States of America is not a proper party plaintiff.

2. The Court below erred in holding that this action could not be conducted and maintained in the name of the

United States, the said ruling being contrary to the provisions of Section 901 of Title 50 United States Code, as amended (Act of July 25, 1946, 60 Stat. 664) and Executive Order No. 9842 issued by the President in pursuance of his authority under the Constitution and statutes of the United States, including Title I of the First War Powers Act, 1941.

3. The Court below erred in failing to hold that the United States is the real party is interest, properly substituted as party plaintiff.

Otto Kerner, Jr.,
United States Attorney.

(Affidavit of mailing attached but not copied.)

39 And on the same day to wit, the 10th day of February, 1950 came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Designation of Record in words and figures following, to wit:

40 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—47-C-604) * *

DESIGNATION OF RECORD.

The United States of America, by Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, designates the following portions of the record to be contained in the record on the appeal of this cause:

1. Complaint filed April 15, 1947.
2. Order entered June 9, 1947, substituting the United States of America as party plaintiff.
3. Motion to Dismiss or Abate, filed January 9, 1950.
4. Order entered January 9, 1950, dismissing this cause.
5. Notice of Appeal.
6. Copy of this Designation.
7. Statement of Points Relied Upon on Appeal.
8. Transcript of proceedings had before the Honorable M. L. Igoe, on Jan. 6, 1950 and Jan. 9, 1950.

Otto Kerner, Jr.,
United States Attorney.

41 And afterwards on, to wit, the 16th day of February, 1950 came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Additional Designation of Record in words and figures following, to wit:

42 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—47-C-604) * *

ADDITIONAL DESIGNATION OF RECORD.

Jack Stein and Harry Robins, defendants, by Sherwin & Sherwin, their attorneys, designate the following additional portions of the record to be contained in the record on the appeal of this cause:

All orders of court reflecting the setting of the above cause for trial and all orders showing the continuance of said cause for trial.

Jack Stein and Harry Robins, individually and doing business as Boulevard Motor Sales, defendants,
By Sherwin & Sherwin,
Their Attorneys,
209 South La Salle St.
CE 6 2010, Chicago,
Theodore R. Sherwin.

Received a copy of the foregoing Additional Designation of Record this 15th day of February 1950.

Otto Kerner, Jr.,
United States Attorney.

43 United States of America,
Northern District of Illinois. } ss.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing, together with the Transcript of Proceedings, incorporated and certified this day in the Transcript of Record on Appeal, in the cause entitled: *United States of America, Plaintiff*, v. *Allied Oil Corporation, Defendant*, No. 44-C-796, to be a true and complete transcript of the proceedings had of record made in accordance with the Designations of Plaintiff and Defendants, Respectively filed in this Court in the cause entitled: *United States of America, Plaintiff*, v. *Jack Stein, et al., Defendants*, No. 47-C-604, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 3rd day of March, 1950.

Roy H. Johnson,

Clerk.

By Gizella Butcher,

Deputy Clerk.

(Seal)

	Page.
Proceedings in U. S. C. A., Seventh Circuit	127
Caption	127
Opinion, Lindley, J	128
Judgment—Case No. 10,132	132
Judgment—Case No. 10,133	133
Judgment—Case No. 10,134	133
Judgment—Case No. 10,135	134
Judgment—Case No. 10,137	134
Judgment—Case No. 10,139	135
Motion for stay of issuance of mandates	136
Order staying issuance of mandates	137
Motion for further stay of issuance of mandates	138
Motion in opposition to motion for further stay of issuance of mandates	140
Order denying motion for further stay of issuance of mandates	141
Clerk's certificate	141
Order allowing certiorari	143

921638—50

At a regular term of the United States Court of Appeals for the Seventh Circuit, held in the city of Chicago and begun on the fourth day of October, in the year of our Lord one thousand, nine hundred and forty-nine, and of our Independence the one hundred seventy-fourth.

No. 10132

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

ALLIED OIL COMPANY, DEFENDANT-APPELLEE

No. 10133

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

P. & M. LIQUOR CORP., ET AL., DEFENDANTS-APPELLEES

No. 10134

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

NICRO STEEL PRODUCTS, INC., DEFENDANT-APPELLEE

No. 10135

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

HARVEY, ET AL., DEFENDANTS-APPELLEES

No. 10137

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

EVA METNICK, DOING BUSINESS AS COUNTY DISTRIBUTORS, ET AL., DEFENDANTS-APPELLEES

No. 10139

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

JACK STEIN AND HARRY ROBINS, INDIVIDUALLY AND DOING BUSINESS AS BOULEVARD MOTOR SALES, DEFENDANTS-APPELLEES

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

And afterward, to wit, on the nineteenth day of July 1950, there was filed in the office of the Clerk of this Court the opinion of the Court, which said opinion is in the words and figures following, to wit:

In the United States Court of Appeals for the Seventh Circuit

OCTOBER TERM, 1949, APRIL SESSION, 1950

No. 10132

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

ALLIED OIL CORPORATION, DEFENDANT-APPELLEE

No. 10133

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

P. & M. LIQUOR CORP., ET AL., DEFENDANT-APPELLEE

No. 10134

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

NICRO STEEL PRODUCTS, INC., DEFENDANT-APPELLEE

No. 10135

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

HARVEY, INC., ET AL., DEFENDANT-APPELLEE

No. 10137

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

KVA METNICK, DOING BUSINESS AS COUNTY DISTRIBUTORS, ET AL., DEPENDANTS-APPELLEES

No. 10139

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

JACK STEIN AND HARRY ROBINS, INDIVIDUALLY AND DOING BUSINESS AS BOULEVARD MOTOR SALES, DEPENDANT-APPELLEES

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

July 19, 1950

Before MAJOR, Chief Judge, and DUFFY and LINDLEY, Circuit Judges.

LINDLEY, Circuit Judge.

These are consolidated appeals from the respective judgments in six causes brought originally by Chester Bowles, Administrator

of the Office of Price Administration, Paul A. Porter, his successor in office, or Philip B. Fleming, Administrator of the Office of Temporary Controls, as successor to Porter, against six different entities to recover damages for sales, in excess of maximum prices, alleged to have been made by defendants in violation of the Emergency Price Control Act of 1942 as amended and the regulations issued pursuant thereto. On June 6, 1947, all the suits were pending in the name of Fleming, Administrator of the Office of Temporary Controls. On that day and the ensuing four days, the District Court, upon motion of the Government, ordered that the United States be substituted as plaintiff in each of the several causes. On January 9, 1950, the court, upon motion of defendants, entered, in each case, an order vacating the last-mentioned order and dismissing the suit, holding (1) that the United States "is not the real party in interest and therefore cannot properly prosecute this case, the real party in interest being the Secretary of Commerce," and (2) that the Secretary of Commerce having failed to be substituted as plaintiff, in conformity with Rule 25 (d) (Federal Rules of Civil Procedure), "the * * * cause is therefore abated." The contested issue on appeal, in the words of the Government, is "whether the United States can maintain these suits * * * in its name."

By section 205 (e) of the Emergency Price Control Act (50 U. S. C. A. App. Sec. 925 (e)), Congress created a civil liability for damages against any seller who should sell commodities at prices in excess of the maximum fixed by the Office of Price Control. Under the Act, for damages resulting, if not sought by the buyer, "the administrator may institute * * * an action." "Any action by the buyer or the administrator, as the case may be, may be brought in any court of competent jurisdiction." Acting under this congressional grant of authority, the administrator, from time to time thereafter, instituted and prosecuted such suits in his name as administrator, his right so to proceed, so far as we are advised, never being questioned. When price control was removed, the Congress, by saving clause in the repealing act (Title 50, U. S. C. A. App. Sec. 901) provided that "the provisions of this act and * * * regulations, orders, price schedules and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action or prosecution with respect to any such right, liability or offense." After repeal, the President, acting in pursuance of Congressional authority, designated Phillip B. Fleming as administrator of the Office of Temporary Controls, to succeed Paul A. Porter, Administrator of Price Control, and he was, by order of the District Court, substituted as plaintiff in each of the suits at bar, which had theretofore been instituted by the Administrator of Price Control in his name, as provided he might

do in Sec. 205 (e) of the Emergency Price Control Act. Still later, on April 23, 1947, the President, by Executive Order #9841 (12 Fed. Reg. 2645) directed (as he was authorized so to do by then existing law), that all price control functions theretofore vested in the Temporary Controls Administrator should be "transferred to the Secretary of Commerce and * * * be performed by him or, subject to his direction and control, by such officers or agencies of the Department of Commerce as the Secretary may designate," and that such transfer of functions should include "authority on the part of each officer to whom such functions are transferred * * * to *institute, maintain, or defend in his own name* civil proceedings in any court * * * relating to the matters transferrd to him, including any such proceedings pending on the effective date of the transfer" of functions to him. (Emphasis supplied). Despite this directive, no application was ever made by the Secretary of Commerce to be substituted for his predecessor as plaintiff in these actions. On June 6 to June 10, 1947, inclusive, however, as we have observed, the government moved and the court ordered that the United States be substituted as party plaintiff in each cause. Still later, upon motion of defendants, the orders last entered were vacated and the suits dismissed.

In view of the Congressional provision of authority in the administrator to prosecute actions in his name, the clause in the repealing act saving remedies and the President's authoritative transfer to the Secretary of Commerce of the remaining functions of price control, including the right to maintain actions such as these in his own name, it would seem clear that the proper party plaintiff, after the transfer mentioned, was the Secretary of Commerce; and so the District Court held, relying upon our decision in Bowles vs. Wilke, 175 Fed. (2d) 35, certiorari denied, 338 U. S. 861. But the government insists that, inasmuch as all such actions are in behalf and for the benefit of the United States, the latter is the real party in interest and can, therefore, always prosecute such actions as the true party in its own name, despite our ruling to the contrary in Bowles vs. Wilke, 175 F. (2d) 35.

The President, says the government, in Executive Order 9842 (12 F. R. 2646), effective on the same date as Order 9841, authorized the Attorney General to maintain these suits in the name of the United States. The first order was made subject to the second. By Order #9842, the Attorney General was authorized and directed to conduct and maintain price control enforcement litigation "in the name of the United States or otherwise as permitted by law." This provision, the government asserts, is a grant of power to the Attorney General to prosecute civil enforcement suits in

the name of the United States. Obviously the President could not create new causes of action or vest a new party with a right of action lodged by act of Congress in another; that could have been done only by the Congress. It would seem clear then, that a direction by the President to conduct suits in the name of the United States, when Congress had provided that the administrator or his successor should have this right, would be beyond the Executive's power. However, we cannot attribute to the President an intent to override the acts of Congress; indeed we think it clear that he intended the contrary, i. e., to direct that proceedings be in accord with congressional enactments and that he was merely directing that the Department of Justice should furnish the staff of manpower, i. e., legal and investigating personnel, necessary effectively to prosecute "price control enforcement litigation," in lieu of conduct of such litigation by the staff of the Office of Price Administration, which had disappeared with repeal of price control; and this, irrespective of whether the suits are criminal, all of which obviously must be brought and prosecuted in the name of the United States, or whether they are civil, to be brought and prosecuted in the manner and in the name of the party "provided by law." In other words, the President directed that the Department of Justice should prosecute all enforcement suits in such manner and in such names as Congress had prescribed. Any other conclusion would result in a determination that the Chief Executive transcended his own authority and encroached upon that of the legislative department. This we are unwilling to do; and we are sure that such was not the intent or purport of what he said. Nor was it a "whim or caprice" upon his part to transfer the function of prosecuting such suits to the Commerce Department, as the government suggests it would have been. On the contrary, this was the exercise of executive discretion, for it was not illogical, when the Office of Price Control was abolished, to transfer its activities to the Department of Commerce, for sales in excess of ceiling prices are a part of commerce. Nor does the fact, if it be a fact, that that department was not staffed with sufficient employees or legal representatives to effectuate enforcement impinge upon the propriety of this conclusion, for it is evident from Order #9842 that it was the President's intent that the Department of Justice should, with its investigating and legal staff, perform the necessary enforcement functions involved in prosecuting enforcement litigation. Such, we think, is the order's plain intent. And by Order #9841, the litigation was to be prosecuted in the name of the Secretary of Commerce.

Inasmuch, therefore, as the court was, in view of the acts of Congress, not justified in permitting anyone to prosecute these

suits other than the Administrator or his successor, and inasmuch as the President had made the Secretary of Commerce the successor, no one other than that successor could be substituted as plaintiff. Hence we reach no question of abatement. Since Congress has not authorized the government to conduct civil enforcement suits in the name of the United States, the Court rightfully dismissed the suits.

The judgments are affirmed.

A True Copy:
Teste:
[SEAL]

KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit.

And on the same day, to wit, on the nineteenth day of July 1950, the following further proceedings were had and entered of record, to wit:

United States Court of Appeals for the Seventh Circuit

Chicago 10, Illinois

Wednesday, July 19, 1950

Before Hon. J. EARL MAJOR, Chief Judge, Hon. F. RYAN DUFFY, Circuit Judge, Hon. WALTER C. LINDLEY, Circuit Judge

No. 10132

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

ALLIED OIL CORPORATION, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed.

And on the same day, to wit, on the nineteenth day of July 1950, the following further proceedings were had and entered of record, to wit:

United States Court of Appeals for the Seventh Circuit

Chicago 10, Illinois

Wednesday, July 19, 1950

Before Hon. J. Earl Major, Chief Judge, Hon. F. Ryan Duffy, Circuit Judge, Hon. Walter C. Lindley, Circuit Judge

No. 10133

United States of America, plaintiff-appellant

vs.

P. & M. Liquor Corp. et al., defendants-appellees

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed.

And on the same day, to wit, on the nineteenth day of July 1950, the following further proceedings were had and entered of record, to wit:

United States Court of Appeals for the Seventh Circuit

Chicago 10, Illinois

Wednesday, July 19, 1950

Before Hon. J. Earl Major, Chief Judge, Hon. F. Ryan Duffy, Circuit Judge, Hon. Walter C. Lindley, Circuit Judge

No. 10134

United States of America, plaintiff-appellant

vs.

Nicro Steel Products, Inc., defendant-appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed.

And on the same day, to wit, on the nineteenth day of July 1950, the following further proceedings were had and entered of record, to wit:

United States Court of Appeals for the Seventh Circuit

Chicago 10, Illinois

Wednesday, July 19, 1950

Before Hon. J. Earl Major, Chief Judge, Hon. F. Ryan Duffy, Circuit Judge, Hon. Walter C. Lindley, Circuit Judge

No. 10135

United States of America, plaintiff-appellant

vs.

Harvey, Inc., et al., defendants-appellees

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed.

And on the same day, to wit, on the nineteenth day of July 1950, the following further proceedings were had and entered of record, to wit:

United States Court of Appeals for the Seventh Circuit

Chicago 10, Illinois

Wednesday, July 19, 1950

Before Hon. J. Earl Major, Chief Judge, Hon. F. Ryan Duffy, Circuit Judge, Hon. Walter C. Lindley, Circuit Judge

No. 10137

United States of America, plaintiff-appellant

vs.

Eva Metnick, Doing Business as County Distributors, et al., defendants-appellees

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed.

And on the same day, to wit, on the nineteenth day of July 1950, the following further proceedings were had and entered of record, to wit:

United States Court of Appeals for the Seventh Circuit

Chicago 10, Illinois

Wednesday, July 19, 1950

Before Hon. J. Earl Major, Chief Judge, Hon. F. Ryan Duffy, Circuit Judge, Hon. Walter C. Lindley, Circuit Judge

No. 10139

United States of America, plaintiff-appellant

vs.

Jack Stein and Harry Robins, Individually and Doing Business as Boulevard Motor Sales, defendants-appellees

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed.

And afterward, to wit, on the twenty-seventh day of July 1950, there was filed in the office of the Clerk of this Court a motion for stay of mandates, which said motion is in the words and figures following, to wit:

In the United States Court of Appeals for the Seventh Circuit

October Term, 1949, April Session, 1950

No. 10132

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

ALLIED OIL CORPORATION, DEFENDANT-APPELLEE

No. 10133

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

P. & M. LIQUOR CORP. ET AL., DEFENDANT-APPELLEE

No. 10134

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

NICRO STEEL PRODUCTS, INC., DEFENDANT-APPELLEE

No. 10135

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

HARVEY, INC., ET AL., DEFENDANT-APPELLEE

No. 10137

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

EVA METNICK, DOING BUSINESS AS COUNTY DISTRIBUTORS ET AL., DEFENDANTS-APPELLEES

No. 10139

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

JACK STEIN AND HARRY ROBINS, INDIVIDUALLY AND DOING BUSINESS AS BOULEVARD MOTOR SALES, DEFENDANTS-APPELLEES

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

U. S. C. A. 7. Filed July 27, 1950. Kenneth J. Carrick, Clerk.

Motion to stay issuance of mandate

Now comes the United States of America, Plaintiff-Appellant, by its attorney, Otto Kerner, Jr., United States Attorney for the

Northern District of Illinois, and prays that the mandates in the above-indicated appeals be stayed and withheld until August 18, 1950, pending application for certiorari to the Supreme Court of the United States.

OTTO KERNER, JR.,
United States Attorney.

And afterward, to wit, on the first day of August 1950, the following further proceedings were had and entered of record, to wit:

United States Court of Appeals for the Seventh Circuit

Chicago 10, Illinois

August 1, 1950

Before Hon. WALTER C. LINDLEY, Circuit Judge

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT
vs.
10132 ALLIED OIL CORPORATION; 10133 P. & M. LIQUOR CORPORATION ET AL.; 10134 NICRO STEEL PRODUCTS., INC.; 10135 HARVEY, INC., ET AL.; 10137 EVA METNICK, ETC., ET AL.; 10139 JACK STEIN AND HARRY ROBINS, ETC., DEFENDANTS-APPELLEES

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

On motion of counsel for the United States of America, plaintiff-appellant, it is ordered that the mandates of this Court in the above-entitled appeals be, and the same are hereby, stayed and withheld until August 18, 1950, pending application for certiorari to the Supreme Court of the United States.

And afterwards, to wit, on the twenty-second day of August 1950, there was filed in the office of the Clerk of this Court a Motion for further stay of mandate which said Motion is in the words and figures following, to wit:

In the United States Court of Appeals for the Seventh Circuit

No. 10132

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT
vs.
ALLIED OIL CORPORATION, DEFENDANT-APPELLEE

No. 10133

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

P. & M. LIQUOR CORP. ET AL., DEFENDANT-APPELLEE

No. 10134

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

NICRO STEEL PRODUCTS, INC., DEFENDANT-APPELLEE

No. 10135

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

HARVEY, INC., ET AL., DEFENDANT-APPELLEE

No. 10137

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

EVA METNICK, DOING BUSINESS AS COUNTY DISTRIBUTORS ET AL., DEFENDANTS-APPELLEES

No. 10139

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

JACK STEIN AND HARRY ROBINS, INDIVIDUALLY AND DOING BUSINESS AS BOULEVARD MOTOR SALES, DEFENDANTS-APPELLEES

U. S. C. A. 7. Filed Aug. 22, 1950. Kenneth J. Carrick, Clerk.

Motion to stay issuance of mandate

Now comes the United States of America, Plaintiff-Appellant, by its attorney, Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and prays that the mandates in the above-indicated appeals, be further stayed and withheld until September 18, 1950, pending application for certiorari to the Supreme Court of the United States.

OTTO KERNER, JR.,
United States Attorney.

No. 10132—Consolidated. In the United States Court of Appeals for the Seventh Circuit. The United States of America, plaintiff-appellant vs. Allied Oil Corporation, defendant-appellee. Motion. Otto Kerner, Jr., United States Attorney. Filed ------, 19 ----. ----------, Clerk. By----------, Deputy.

And afterwards, to wit, on the twenty-fourth day of August 1950, there was filed in the office of the Clerk of this Court a Motion of Jack Stein and Harry Robins in opposition to Motion for further stay of mandate which said Motion is in the words and figures following, to wit:

In the United States Court of Appeals for the Seventh Circuit

No. 10132

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

ALLIED OIL CORPORATION, DEFENDANT-APPELLEE

No. 10133

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

P. & M. LIQUOR CORP., ET AL., DEFENDANT-APPELLEE

No. 10134

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

NICRO STEEL PRODUCTS, INC., DEFENDANT-APPELLEE

No. 10135

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

HARVEY, INC., ET AL., DEFENDANT-APPELLEE

No. 10137

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

EVA METNICK, DOING BUSINESS AS COUNTY DISTRIBUTORS, ET AL., DEFENDANTS-APPELLEES

No. 10139

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

JACK STEIN AND HARRY ROBINS, INDIVIDUALLY AND DOING BUSINESS AS BOULEVARD MOTOR SALES, DEFENDANTS-APPELLEES

Motion of Jack Stein and Harry Robins in opposition to motion of United States of America for further stay of mandate

Now come Jack Stein and Harry Robins, defendants-appellees, by Theodore R. Sherwin, their attorney, and move the court to deny the request of the Government for a further stay of mandate herein, and in support of said motion state as follows:

1. The judgment of this court was entered on July 19, 1950, and thereafter, on the motion of the United States of America, this court entered an order staying the mandate herein for thirty days, until August 18, 1950.

2. The present motion for a further stay of mandate contains no statement, reason or suggestion to the court in support of said motion. No reason is given why the petition for certiorari could not be pleaded and filed within the stay originally ordered by the court, nor is any statement made that the petition for certiorari is actually in preparation and will be completed and filed within the period requested for a further stay of mandate.

3. The cases involved in this proceeding had been pending for various periods ranging from three to six years, and it is time that this litigation be concluded without further unexplained delay on the part of the appellants.

JACK STEIN and HARRY ROBINS,
Defendants-Appellees,
By THEODORE R. SHERWIN,
Their Attorney.

Notice

To OTTO KERNER, JR.,
United States Attorney:

Please take notice, that we have this day filed with the Clerk of the United States Court of Appeals the motion of Jack Stein and Harry Robins, in opposition to the Government's motion for a further stay of mandate.

THEODORE R. SHERWIN,
Attorney for Jack Stein and Harry Robins.

Received a copy of the above notice, together with a copy of the motion therein referred to, this 24th day of August 1950.

OTTO KERNER, JR.,
United States Attorney.

Nos. 10132, 10133, 10134, 10135, 10137, 10139. In the United States Court of Appeals, Seventh Circuit. The United States of America v. Allied Oil Corporation, Same v. P. & M. Liquor Corp. et al., Same v. Nicro Steel Products, Inc., Same v. Harvey, Inc. et al., Same v. Eva Metnick, d/b/a County Distributors, et

al., Same v. Jack Stein and Harry Robins individually and d/b/a Boulevard Motor Sales. Motion of Jack Stein and Harry Robins in opposition to motion of United States of America for further stay of mandate. U. S. C. A. 7. Filed Aug. 24, 1950. Kenneth J. Carrick, Clerk. Law offices Sherwin & Shewin, 209 South LaSalle Street, Chicago 4, Ill., telephone: Central 6-2010.

And afterwards, to wit, on the twenty-eighth day of August 1950, the following further proceedings were had and entered of record, to wit:

United States Court of Appeals for the Seventh Circuit

Chicago 10, Illinois

August 28, 1950

Before Hon. J. Earl Major, Chief Judge, Hon. F. Ryan Duffy, Circuit Judge, Hon. Walter C. Lindley, Circuit Judge

United States of America, plaintiff-appellant

vs.

10132 Allied Oil Corporation; 10133 P. & M. Liquor Corporation et al.; 10134 Nicro Steel Products, Inc.; 10135 Harvey, Inc., et al.; 10137 Eva Metnick, etc., et al.; 10139 Jack Stein and Harry Robins, etc., defendants-appellees

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

It is ordered by the Court that the motion of the United States of America, plaintiff-appellant, for a further stay of the issuance of the mandates of this Court in the above entitled appeals, be, and the same is hereby, denied.

United States Court of Appeals for the Seventh Circuit

Chicago 10, Illinois

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages contain a true copy of Opinion filed July 19, 1950, Judgments entered July 19, 1950, Motion for stay of mandates filed July 27, 1950, Order staying issuance of mandate entered August 1, 1950, Motion for further stay of issuance of mandates filed August 22, 1950, Motion in opposition to further

stay of mandates filed August 24, 1950 and Order denying further stay of issuance of mandates entered August 28, 1950 in Cause Nos. 10132, 10133, 10134, 10135, 10137, 10139, the United States of America, Plaintiff-Appellant vs. Allied Oil Company, et al., Defendants-Appellees, as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the city of Chicago, this twenty-eighth day of August A. D. 1950.

[SEAL]

KENNETH J. CARRICK,
Clerk of the United States Court of Appeals
for the Seventh Circuit.

U. S. GOVERNMENT PRINTING OFFICE, 1950

Supreme Court of the United States

No. 364, October Term, 1950

Order allowing certiorari

Filed December 4, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1950

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U. S.
FILED
OCT 16 1950
CHARLES ELMORE CROPLEY
CLERK

No. 364

In the Supreme Court of the United States

OCTOBER TERM, 1950

UNITED STATES OF AMERICA, PETITIONER

v.

ALLIED OIL CORPORATION, P. & M. LIQUOR CORP., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Executive orders involved	2
Statement	2
Reasons for granting the writ	5
Conclusion	12
Appendix	13

CITATIONS

Cases:

Ralph D'Oench Co. v. *Woods*, 171 F. 2d 112	6, 10
Fleming v. *Goodwin*, 165 F. 2d 334, certiorari denied *sub nom. Goodwin* v. *United States*, 334 U. S. 828	5, 6
Fleming v. *People's Natural Gas Co.*, 8 F.R.D. 42	6
Hal-Mar Dress Co. v. *Clark*, 165 F. 2d 222	10
Larson v. *Domestic and Foreign Corp.*, 337 U. S. 682	7
Louisiana v. *McAdoo*, 234 U. S. 627	7
Northwestern Lumber and Shingle Co. v. *United States*, 170 F. 2d 692	6
Porter v. *Maule*, 160 F. 2d 1	6
Porter v. *Steger*, 74 F. Supp. 109	6
Seven Oaks v. *Federal Housing Administration*, 171 F. 2d 947	6, 7
United States v. *Koike*, 164 F. 2d 155	5
United States v. *Munsingwear, Inc.*, Nos. 23 and 24, this Term	11
United States v. *Summerlin*, 310 U. S. 414	7

Statutes:

Emergency Price Control Act of 1942, 56 Stat. 23, as amended:	
Sec. 1(b) (10 U.S.C. App. 901(b))	3
Sec. 201(b) (50 U.S.C. App. 921(b))	8
Sec. 205(e) (50 U.S.C. App. 925(e))	2, 5, 6, 11
First War Powers Act, Title I (55 Stat. 838, 50 U.S.C. App. 601)	8, 9
National Housing Act (12 U.S.C. 1702)	7

Miscellaneous:

Department of Justice Order No. 3732, Supplement No. 43, dated May 22, 1950	5
Executive Order 9841 (12 F.R. 2645)	2, 3, 9, 10, 13
Executive Order 9842 (12 F.R. 2646)	2, 3, 7-8, 10, 19
OPA Supplementary Order 193 (11 F.R. 13464)	3
Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States* (1936), Sec. 309, p. 628	11

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 364

UNITED STATES OF AMERICA, PETITIONER

v.

ALLIED OIL CORPORATION, P. & M. LIQUOR CORP., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Seventh Circuit entered on July 19, 1950.

OPINION BELOW

The opinion of the Court of Appeals (R. 128-132) is reported at 183 F. 2d 453.

JURISDICTION

The judgments of the Court of Appeals were entered on July 19, 1950 (R. 132-135). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether pending suits for the recovery of damages for sales at prices in excess of those established by applicable regulations under the Emergency Price Control Act of 1942, as amended (50 U.S.C. App. 901, *et seq.*), may be maintained by the United States in its own name, or must be maintained in the name of the Secretary of Commerce.

EXECUTIVE ORDERS INVOLVED

Executive Orders 9841 (12 F.R. 2645) and 9842 (12 F.R. 2646) are set forth in the Appendix, *infra*, pp. 13-20.

STATEMENT

The six cases here involved were brought in the United States District Court for the Northern District of Illinois under Section 205(e) of the Emergency Price Control Act of 1942 as amended (50 U.S.C. App. 925(e)), for the recovery of damages for sales allegedly at prices in excess of the maximum prices prescribed by applicable OPA regulations (R. 6-7, 34-37, 54-58, 74-78, 94-96, 112-114). Complaints against Allied Oil Corp. P. & M. Liquor Corp. and Nicro Steel Products, Inc. were filed respectively on July 10, 1944, November 1, 1944 and May 21, 1945, all in the name of Chester Bowles, Price Administrator (R. 6, 34, 54). Two complaints, those against Harvey, Inc. and Eva Metnick, were filed respectively on April 26, 1946

and December 3, 1946[1] by Paul A. Porter, then Price Administrator (R. 74, 94). The complaint against Jack Stein and Harry Robins was filed April 15, 1947 by Philip B. Fleming, Temporary Controls Administrator (R. 112). The complaint in each action expressly recited that the action was brought "for and on behalf of the United States."

Thereafter, in due course, the names of successor Price Administrators were substituted as plaintiff in each case (R. 8, 38, 58-59, 79, 97).

The cases were pending in this posture when, on April 23, 1947, the President issued Executive Orders 9841 and 9842 (Appendix, *infra*, pp. 13-20). The former order distributed the functions which had been lodged first in the Price Administrator and then in the Office of Temporary Controls. The distribution of functions resulted in the assignment of duties to the Housing Expediter, the Secretary of Agriculture, the Reconstruction Finance Corporation, and the Secretary of Commerce. Executive Order 9842, relating to the conduct of certain litigation under wartime legislation, authorized and directed the Attorney General

---

[1] OPA Supplementary Order 193 (11 F.R. 13464) decontrolled as of November 10, 1946, all the commodities of which overceiling sales were alleged in the six suits, but Section 1(b) of the Emergency Price Control Act (10 U.S.C. 901(b)) provided "that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense."

to conduct and maintain in the name of the United States or otherwise as permitted by law specified litigation including "Litigation against violators of regulations, schedules or orders relating to maximum prices pertaining to any commodity which has been removed from price control."

Within six months of June 1, 1947, the effective date of the material provisions of the Executive Orders, the Government obtained orders from the district court substituting the United States as plaintiff in each case (R. 9, 39, 60, 79, 97, 115). Two and one-half years later, on January 9, 1950, the district court, upon motion of the defendants, determined that the United States was not the real party in interest and that the Secretary of Commerce was the real party in interest. Accordingly, orders were entered vacating the prior orders which had substituted the United States as plaintiff and dismissing the actions because the Secretary of Commerce had not been timely substituted as plaintiff (R. 17-20, 39-42, 60-62, 80-82, 98-100, 119-121).

Upon the Government's appeals to the Court of Appeals for the Seventh Circuit, the orders were affirmed (R. 131-132). The court held that a proper construction of the Executive Orders required that the litigation should have been conducted in the name of the Secretary of Commerce.

REASONS FOR GRANTING THE WRIT

In holding that the United States may not conduct in its own name a treble damage action under the Emergency Price Control Act, the decision of the court below is squarely in conflict with recent decisions of the Eighth, Ninth and Tenth Circuits, which have held that the United States is the real party in interest in a treble damage action and may conduct litigation in its own name. The decision affects more than 100 such suits now pending in the District Court for the Seventh Circuit. If followed elsewhere, some of the more than 400 additional cases in other circuits will likewise be affected.[2] This would be tantamount to a grant of judicial amnesty[3] to persons charged with violations of earlier controls and could not but have an adverse effect upon the administration and enforcement of new controls now in effect, as well as others likely to follow.

1. The decision below is squarely in conflict with *Fleming* v. *Goodwin*, 165 F. 2d 334 (C.A. 8), certiorari denied *sub nom. Goodwin* v. *United States*, 334 U.S. 828; *United States* v. *Koike*, 164

---

[2] This information as to pending OPA enforcement suits was reported in incomplete replies to Department of Justice Order No. 3732, Supplement No. 43, dated May 22, 1950, requesting such advice from all United States Attorneys. In none of these cases, so far as we know, was the Secretary of Commerce substituted as plaintiff.

[3] Since the one year statute of limitations (50 U.S.C. App. 925(e)) has run in all these cases it will be impossible to commence any of them anew.

F. 2d 155 (C.A. 9); *Northwestern Lumber and Shingle Co.* v. *United States*, 170 F. 2d 692 (C.A. 10).[4]

These circuits have adhered to the settled rule of law that actions such as those at bar, as the Eighth Circuit stated, are "in substance and reality at all times a controversy between the Government and the appellees" warranting the substitution of the United States as plaintiff, *Fleming* v. *Goodwin*, 165 F. 2d at 338.

That the United States is the real party in interest is plain from a reading of Section 205(e) of the Emergency Price Control Act.[5] That section specified that these actions should be brought "on behalf of the United States." In the trial court, the complaints in the present actions were entitled in the name of the Administrator "for and on behalf of the United States", and the complaints demanded judgment against the defendant

---

[4] See also, *Ralph D'Oench Co.* v. *Woods*, 171 F. 2d 112 (C.A. 8); *Seven Oaks* v. *Federal Housing Administration*, 171 F. 2d 947 (C.A. 4); *Porter* v. *Steger*, 74 F. Supp. 109, 113 (D. Md.); *Fleming* v. *People's Natural Gas Co.*, 8 F.R.D. 42, 45 (W.D. Pa.); cf. *Porter* v. *Maule*, 160 F. 2d 1, 3 (C.A. 5).

[5] Section 205(e) (50 U.S.C. App. 925(e)) provided in pertinent part as follows:

"If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period."

"for and on behalf of the United States." See *Larsen* v. *Domestic and Foreign Corp.*, 337 U.S. 682, 686; *Louisiana* v. *McAdoo*, 234 U.S. 627, 629; *Seven Oaks* v. *Federal Housing Administration*, 171 F. 2d 947 (C.A. 4). It is apparent that as the real party in interest the United States could have instituted these actions in its own name, notwithstanding that the Emergency Price Control Act also permitted the Administrator to make himself the nominal plaintiff. In *United States* v. *Summerlin*, 310 U.S. 414, 416, this Court dealt with a similar provision in the National Housing Act (12 U.S.C. 1702) as follows:

> The claim assigned to the Federal Housing Administrator acting on behalf of the United States became the claim of the United States, and the United States thereupon became entitled to enforce it.

Since the action plainly is for the United States, the Eighth, Ninth and Tenth Circuits properly allowed the United States to be substituted as a party. Any other result amounts to a disregard of reality.

2. In our view, the basic difficulty with the reasoning of the court below is the court's failure to recognize that the United States always is the real party in interest in a treble damage action. Once this is recognized, the court's construction of the Executive Orders is without a firm foundation. The President, by Executive Order 9842,

directed the Attorney General to maintain litigation against price control violators "in the name of the United States or otherwise as permitted by law." This assumed, as the Eighth, Ninth and Tenth Circuits have held, that the United States is the real party in interest in a treble damage action and that in this circumstance the litigation properly could be conducted in the name of the United States. It is with respect to this assumption that the area of conflict exists which requires resolution by this Court.

The court below thought that Executive Order 9841 transferred to the Secretary of Commerce "the remaining functions of price control" (R. 130), and that this included the litigation of treble damage actions in the name of the Secretary of Commerce, notwithstanding the admitted fact that the entire conduct of the litigation was lodged by Executive Order 9842 in the Attorney General. But even a casual examination of Executive Order 9841 demonstrates that the Price Administrator's functions were not transferred *in toto* to the Secretary of Commerce; they were divided up and parceled out to the various interested agencies of the Government (see *supra*, pp. 3-4).[6] The

[6] Broad discretion to distribute OPA functions and powers to such agencies as he saw fit was given to the President by Section 201(b) of the Emergency Price Control Act (50 U.S.C. App. 921(b)) and Title I of the First War Powers Act (50 U.S.C. App. 601). Section 201(b) provided in pertinent part—

"The President is authorized to transfer any of the powers and functions conferred by this Act upon the Office of Price

function of conducting litigation against violators of price orders relating to commodities which are no longer subject to controls was lodged in the Attorney General. The net result of the decision below is to recognize the Attorney General as the delegate of litigation powers but to insist that the Secretary of Commerce is an indispensable party to the proceedings even though he has nothing to do with them. Nothing in the law requires such an absurd result.

It is true that Executive Order 9841 lodged in the Secretary of Commerce power to conduct litigation, but that power, it should be noted, did not extend to litigation involving price control orders relating to commodities which are no longer subject to controls. Thus, Section 302 of Order 9841, without any reference to the conduct of litigation, transferred to the Secretary of Commerce all the not otherwise disposed of "functions" of the Temporary Controls Administrator. Section 402 defined "functions" as including "authority on the part of each officer to whom

---

Administration with respect to a particular commodity or commodities to any other department or agency of the Government having other functions relating to such commodity or commodities, * * *."

The First War Powers Act authorized the President:

"to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, governmental corporation, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this title * * *."

such functions are transferred hereunder to institute, maintain, or defend in his own name civil proceedings in any court (including the Emergency Court of Appeals) relating to the matters transferred to him * * *." Maintenance of litigation was thus merely an adjunct to the transfer of some function to which the litigation related. The scheme was a logical one. The power to sue for damages and injunctions, to compromise or refuse to compromise, is an important and effective aid in the administration of a substantive program. Thus, under the Emergency Price Control Act, the Price Administrator was given complete control over his own civil litigation. So also, under Executive Order 9841, the transfers of administrative functions were accompanied by the authority to conduct related litigation. See, for example, *Ralph D'Oench* v. *Woods,* 171 F. 2d 112, 114 (C.A. 8). But, with respect to decontrolled commodities, the only thing left to do was to dispose of the suits, and that power was lodged in the Attorney General by Executive Order 9842. Hence, the Secretary of Commerce was vested neither with any functions to which this litigation related nor, consequently, with authority to maintain the litigation. When the contemporaneous orders are read together, as they must be, there is no room for doubt that this is what the President undertook to accomplish.

This view of the Executive Orders was adopted by the Emergency Court of Appeals. *Hal-Mar*

Dress Co. v. *Clark*, 165 F. 2d 222. That court was required to determine whether the Attorney General or the Director of the Division of Liquidation, acting for the Secretary of Commerce, had jurisdiction to act upon an application under Section 205(e) of the Emergency Price Control Act of 1942 as amended (50 U.S.C. App. 925(e)) for the dismissal of a pending OPA treble damage suit. The court decided that the Attorney General had jurisdiction, pursuant to authority granted him by Executive Order 9842.

3. The short of the matter is that a rule of law is being applied in the Seventh Circuit which conflicts with the principle being applied in the remainder of the nation. Affecting as it does the ability to litigate a considerable number of pending treble damage actions, the decision below has important repercussions. It is a decision which, we believe, is clearly incorrect and one which should be reversed by this Court.

4. The issue presented by this petition is the same as one now before this Court in *United States* v. *Munsingwear, Inc.*, Nos. 23 and 24, this Term. See Brief for Respondent, pp. 42-63, and Supplemental Brief for the United States, pp. 13-34. That fact alone warrants consideration of the merits of the judgments below by this Court. See Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States* (1936), sec. 309, p. 628.

CONCLUSION

The petition for writs of certiorari should be granted.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

OCTOBER 1950.

APPENDIX

Executive Order 9841 (12 F. R. 2645) provides as follows:

TERMINATION OF THE OFFICE OF TEMPORARY CONTROLS

WHEREAS the Congress, in the urgent Deficiency Appropriation Act, 1947, approved March 22, 1947, has declared its intent that the Office of Temporary Controls be closed and liquidated by June 30, 1947; and

WHEREAS it is necessary to provide for the orderly liquidation of such Office and the disposition of its residual affairs:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and Statutes, including the last paragraph of Title I of the First Supplemental Surplus Appropriation Rescission Act, 1946, approved February 18, 1946, Title III of the Second War Powers Act, 1942 as amended by the First Decontrol Act of 1947, section 201(b) of the Emergency Price Control Act of 1942, as amended, section 2 of the Stabilization Act of 1942, as amended, and Title I of the First War Powers Act, 1941, and as President of the United States, it is hereby ordered, in the interest of the internal management of the Government as follows:

Part I

101. The Office of Temporary Controls, established by Executive Order No. 9809 of December 12, 1946, shall be terminated and disposition

shall be made of its functions according to the provisions of this order.

Part II

201. The provisions of this Part shall become effective on May 4, 1947.

202. Functions of the Temporary Controls Administrator under the Emergency Price Control Act of 1942, as amended, Executive Order No. 9809, and any other statute, order, or delegation are transferred as follows:

(a) Functions with respect to rent control are transferred to the Housing Expediter and shall be performed by him or, subject to his direction and control, by such officers or agencies of the Government as he may designate.

(b) Functions with respect to price control over rice are transferred to the Secretary of Agriculture and shall be performed by him or, subject to his direction and control, by such officers or agencies of the Department of Agriculture as he may designate.

(c) Functions with respect to (1) subsidies, including determinations of the correct amounts of claims and the recovery of over-payments (but excluding premium-payment functions transferred under paragraph 302 (b) hereof); (2) applications for price adjustments filed under Supplementary Order 9 and Procedural Regulation 6 (Adjustment of Maximum Prices for Commodities and Services under Government Contracts or Subcontracts, 7 F.R. 5087, 5444) of the Office of Price Administration; and (3) the inter-

pretation and application of price and subsidy regulations and orders which affect the amount of subsidy payable; are transferred to the Reconstruction Finance Corporation.

203. The following functions of the Temporary Controls Administrator are transferred to the Secretary of Commerce and shall be performed by him or, subject to his direction and control, by such officers and agencies of the Department of Commerce as he may designate:

(a) Functions of the President under Title III of the Second War Powers Act, 1942, as amended, vested in the Temporary Controls Administrator immediately prior to the taking of effect of this Part.

(b) Functions with respect to determining, under section 6(a) of the Strategic and Critical Materials Stockpiling Act, the amount of strategic and critical materials necessary to make up any deficiency of the supply thereof for the current requirements of industry.

(c) Functions under section 124 of the Internal Revenue Code, as amended.

(d) Functions under section 12 of the Act of June 11, 1942 (the Small Business Mobilization Act).

(e) Functions with respect to claims relating to the expansion of the capacity of defense plants when such expansion is alleged to have been undertaken at the request of the War Production Board or any of its predecessor agencies.

(f) Functions with respect to claims relating to property requisitioned by the Chairman of the

War Production Board or by any of his predecessors.

(g) Except as otherwise provided by statute or this or any other Executive order, all other functions of the Temporary Controls Administrator which were immediately prior to the taking of effect of Executive Order No. 9809 vested in the Civilian Production Administrator.

204. Executive Order No. 9705 of March 15, 1946 (as modified by Executive Orders Nos. 9762 and 9809) is revoked.

205. Any authority vested in the Temporary Controls Administrator in pursuance of section 120 of the National Defense Act of 1916 (with respect to placing compulsory orders for products or materials) is withdrawn and terminated.

Part III

301. The provisions of this Part shall become effective June 1, 1947.

302. All functions vested in the Temporary Controls Administrator by Executive Order No. 9809 not otherwise disposed of by statute or by this or any other Executive order are transferred to the Secretary of Commerce and shall be performed by him or subject to his direction and control, by such officers or agencies of the Department of Commerce as the Secretary may designate. Such functions shall include, but not be limited to, the following:

(a) Functions of the President under the Stabilization Act of 1942, as amended, vested in the

Temporary Controls Administrator immediately prior to the taking of effect of this Part.

(b) Functions with respect to premium payments under section 2(e)(a)(2) of the Emergency Price Control Act of 1942, as amended, insofar as such payments relate to copper, lead, and zinc ores.

(c) Functions with respect to the establishment of maximum prices for industrial alcohol sold to the Government or its agencies.

(d) The liquidation of the functions of the Office of Temporary Controls and of the agencies thereof, except liquidation relating to functions specifically transferred to other agencies (by the provisions of this order or otherwise).

303. The Office of Temporary Controls is terminated.

Part IV

401. The provisions of this Part shall become effective, respectively, on the dates on which functions are transferred or otherwise vested by the provisions of this order.

402. Functions under the Emergency Price Control Act of 1942, as amended, transferred under the provisions of this order shall be deemed to include authority on the part of each officer to whom such functions are transferred hereunder to institute, maintain, or defend in his own name civil proceedings in any court (including the Emergency Court of Appeals), relating to the matters transferred to him, including any such proceedings pending on the effective date of the

transfer of any such function under this order. The provisions of this paragraph shall be subject to the provisions of the Executive order entitled "Conduct of Certain Litigation Arising Under Wartime Legislation," issued on the date of this order and effective June 1, 1947.

403. (a) The records, property, and personnel relating primarily to the respective functions transferred under the provisions of this order shall be transferred, and the funds relating primarily to such respective functions shall be transferred or otherwise made available, to the agencies to which such functions are transferred. Such measures and dispositions as may be determined by the Director of the Bureau of the Budget to be necessary to effectuate the purposes and provisions of this paragraph shall be carried out in such manner as the Director may determine and by such agencies as he may designate.

(b) In order that the confidential status of any records affected by this order shall be fully protected and maintained, the use of any confidential records transferred hereunder shall be so restricted by the respective agencies as to prevent the disclosure of information concerning individual persons or firms to persons who are not engaged in functions or activities to which such records are directly related, except as provided for by law or as required in the final disposition thereof pursuant to law.

404. All provisions of prior Executive orders in conflict with this order are amended accordingly. All other prior and currently effective orders, rules, regulations, directives, and other

similar instruments relating to any function transferred by the provisions of this order or issued by any agency terminated hereunder or by any predecessor or constituent agency thereof, shall remain in effect except as they are inconsistent herewith or are hereafter amended or revoked under proper authority.

405. As used in this order, "functions" includes powers, duties, authorities, discretions, and responsibilities.

HARRY S. TRUMAN.

THE WHITE HOUSE.
April 23, 1947.

Executive Order 9842 (12 F.R. 2646) provided as follows:

CONDUCT OF CERTAIN LITIGATION ARISING UNDER WARTIME LEGISLATION

By virtue of the authority vested in me by the Constitution and statutes, including Title I of the First War Powers Act, 1941, and as President of the United States, and having regard to the established responsibilities and powers of the Department of Justice and of the Attorney General under the statutes of the United States, it is hereby ordered, in the interest of the internal management of the Government, as follows:

1. The Attorney General is authorized and directed, in the name of the United States or otherwise as permitted by law, to coordinate, conduct, initiate, maintain or defend:

(a) Litigation before the Emergency Court of Appeals for and on behalf of the Secretary of

Agriculture, the Secretary of Commerce, and the Reconstruction Finance Corporation, respectively;

(b) Litigation against violators of regulations, schedules or orders relating to maximum prices pertaining to any commodity which has been removed from price control;

(c) Litigation arising out of Directive 41, as amended, of the Office of Economic Stabilization pertaining to the withholding of subsidies because of noncompliance with or violations of control orders.

2. Nothing herein shall be deemed to restrict or limit the powers conferred upon the Attorney General by law with respect to the conduct, settlement, disposition or review of litigation.

3. The functions and duties of the Attorney General under this order shall be performed by him or, subject to his direction and control, by such officers or agencies of the Department of Justice as he may designate, and there shall be made available to the Attorney General, pursuant to the provisions of Executive Order No. 9784 of September 25, 1946, any files or records pertinent to the subject matter hereof.

4. This order shall become effective June 1, 1947.

HARRY S. TRUMAN.

THE WHITE HOUSE.
April 23, 1947.

☆ U. S. GOVERNMENT PRINTING OFFICE 1950 911220 259

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
FEB 15 1951
CHARLES ELMORE CROPLEY

No. 364

In the Supreme Court of the United States

OCTOBER TERM, 1950

UNITED STATES OF AMERICA, PETITIONER

v.

ALLIED OIL CORPORATION, P. & M. LIQUOR CORP., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Executive Orders and rule involved	2
Statement	3
Specifications of errors to be urged	6
Summary of argument	7
Argument	10
I. The President may provide that pending treble damage actions be maintained in the name of the United States	12
II. Executive Orders 9841 and 9842 authorized the substitution of the United States, not the Secretary of Commerce, as the party plaintiff in pending treble damage actions	24
III. Rule 25 (d) of the Federal Rules of Civil Procedure is inapplicable to treble damage actions instituted by the Price Administrator on behalf of the United States under Section 205 (e) of the Emergency Price Control Act	37
Conclusion	45
Appendix A	46
Appendix B	54

CITATIONS

Cases:

Bowles v. *Babar*, 54 F. Supp. 453	39
Bowles v. *Goldman*, 7 F. R. D. 12	19, 39
Bowles v. *Weiner*, 6 F. R. D. 540	39
Bowles v. *Wilke*, 175 F. 2d 35, certiorari denied, 338 U. S. 861	23-24, 28, 38, 40, 44
Cherry Cotton Mills v. *United States*, 327 U. S. 536	19, 20-21
Commissioners v. *Sellew*, 99 U. S. 624	40
Creedon, In re, 7 F. R. D. 546	39
Defense Supplies Corp. v. *Lawrence Warehouse Co.*, 336 U. S. 631	44
Federal Housing Administration v. *Burr*, 309 U. S. 242	19
Fix v. *Philadelphia Barge Co.*, 290 U. S. 530	43, 44
Fleming v. *Goodwin*, 165 F. 2d 334, certiorari denied *sub nomine Goodwin* v. *United States*, 334 U. S. 828,	18, 22, 23, 25, 38, 40, 42, 44
Fleming v. *Mohawk Co.*, 331 U. S. 111	8, 15, 16, 35, 39
Fleming v. *People's Natural Gas Co.*, 8 F. R. D. 42	22, 25, 39

Cases—Continued

	Page
Hal-Mar Dress Co. v. *Clark, Director, Division of Liquidation, Department of Commerce*, 165 F. 2d 222	25, 26
Hansen Bakeries, In re, 103 F. 2d 665	17
Herren v. *Farm Security Administration*, 153 F. 2d 76	17
Inland Waterways Corp. v. *Young*, 309 U. S. 517	19
Irvin v. *Wright*, 258 U. S. 219	42
Irving Trust Company v. *American Silk Mills, Inc.*, 72 F. 2d 288, certiorari denied, 293 U. S. 624	21
Korman v. *Federal Housing Administrator*, 113 F. 2d 743	17
Lake Shore and M. S. Railway Company v. *City of Elyria*, 69 Ohio St. 414	21
Larson v. *Domestic and Foreign Corp.*, 337 U. S. 682	18
Louisiana v. *McAdoo*, 234 U. S. 627	18
Marshall v. *Dye*, 231 U. S. 250	42
Murphy v. *Utter*, 186 U. S. 95	40, 42
North Dakota-Montana Wheat Growers' Ass'n. v. *United States*, 66 F. 2d 573	17
Northwestern Lumber & Shingle Co. v. *United States*, 170 F. 2d 692	19, 22, 39
Norwegian Nitrogen Products Co. v. *United States*, 288 U. S. 294	37
Parker, In re Hollon, 131 U. S. 221	40
Porter v. *American Distilling Co.*, 71 F. Supp. 483	19
Porter v. *Maule*, 160 F. 2d 1	19, 22, 39
Porter v. *Pure Oil Co.*, 7 F. R. D. 577	39
Porter v. *Sands*, 74 F. Supp. 494	39
Porter v. *Steger*, 74 F. Supp. 109	22, 25
Ralph D'Oench Co. v. *Woods*, 171 F. 2d 112	22, 34, 39
Seven Oaks v. *Federal Housing Administration*, 171 F. 2d 947	18, 22, 39, 43
Snyder v. *Buck*, 340 U. S. 15	37, 41
State of Nebraska v. *Hayden*, 89 Fed. 46	21
Thompson v. *United States*, 103 U. S. 480	40
United States v. *American Trucking Assns., Inc.*, 310 U. S. 534	37
United States v. *Koike*, 164 F. 2d 155	19, 22, 25
United States v. *Remund*, 330 U. S. 539	17, 19, 20
United States v. *Saunders Petroleum Co., Inc.*, 7 F. R. D. 608	19
United States v. *Seigel*, 168 F. 2d 143	39
United States v. *Summerlin*, 310 U. S. 414	19, 20
United States ex rel. Bernardin v. *Butterworth*, 169 U. S. 600	40, 41
Winthrop v. *Farrar*, 11 Allen (93 Mass.) 398	21

Statutes:

	Page
Act of February 8, 1899, c. 121, 30 Stat. 822	40, 43, 44
Emergency Price Control Act of 1942, as amended (50 U. S. C. App. 901, *et seq.*):	
Sec. 1 (b)	4, 7, 14
Sec. 201 (a)	17
Sec. 205	19
Sec. 205 (e)	3, 7, 8, 10, 11, 12, 13, 18, 26, 43
First War Powers Act (55 Stat. 838, 50 U. S. C. App. 601):	
Sec. 1	7, 15
Judiciary Act of 1925 (43 Stat. 936 (1946 ed. 780), Sec. 11	43
Price Control Extension Act of 1946, 60 Stat. 677, Sec. 12	26
R. S. 3466 (31 U.S.C. 191)	20
Urgent Deficiency Appropriation Act of 1947 (61 Stat. 14, 16)	4
12 U. S. C. 1702	20
28 U. S. C. 250 (2) (now 28 U. S. C. 1503, as revised)	21
28 U. S. C. (1946 ed.) 780	2, 44
28 U. S. C. 2105	37

Miscellaneous:

	Page
Attorney General's Circular 3987 issued May 19, 1947	36
Budget of the United States for the fiscal year ending June 30, 1949, p. 404	31
Budget of the United States for the fiscal year ending June 30, 1950, p. 425	31
31 Cong. Rec. 779	42
31 Cong. Rec. 3865-3866	42
Executive Order 9809 (11 Fed. Reg. 14281)	16
Executive Order No. 9841 (12 Fed. Reg. 2645),	2, 4, 12, 15, 32, 34, 46
Sec. 101	46
Sec. 201	47
Sec. 202	30, 47
Sec. 203	48
Sec. 204	49
Sec. 205	49
Sec. 301	49
Sec. 302	8, 24, 30, 31, 49
Sec. 303	50
Sec. 401	50
Sec. 402	8, 24, 25, 30, 31, 32, 50
Sec. 403	51
Sec. 404	52
Sec. 405	52

Miscellaneous—Continued

	Page
Executive Order No. 9842 (12 Fed. Reg. 2646).	2, 5, 8, 12, 15, 28, 30, 32, 34, 52
Par. 1	28, 53
Par. 1 (a)	29, 53
Par. 1 (b)	5, 29, 53
Par. 1 (c)	53
Par. 2	33, 53
Par. 3	53
Par. 4	54
Federal Rules of Civil Procedure:	
Rule 1	43
Rule 15 (a)	22
Rule 15 (b)	22
Rule 17 (a)	22
Rule 21	22
Rule 25	43
Rule 25 (d)	2, 9, 10, 12, 23, 24, 37, 38, 39, 40, 43, 44
Rule 81	43
H. R. 6901, 55th Cong., 2d Sess.	41
H. Rep. No. 960, 55th Cong., 2d Sess.	42
H. Rep. No. 308, 80th Cong., 1st Sess., A 239	43
Interim Program Report of the Division of Liquidation, Department of Commerce, June 1, 1947—September 30, 1947, pp. 3, 5	36
OPA Supplementary Order 193 (11 F. R. 13464)	4

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 364

UNITED STATES OF AMERICA, PETITIONER

v.

ALLIED OIL CORPORATION, P. & M. LIQUOR CORP., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (R. 127-132) is reported at 183 F. 2d 453. The United States District Court for the Northern District of Illinois entered no written opinion.

JURISDICTION

The judgments of the Court of Appeals were entered on July 19, 1950 (R. 132-135). The petition

for a writ of certiorari was filed on October 16, 1950, and granted on December 4, 1950 (R. 143). The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether pending suits for the recovery of damages for sales at prices in excess of those established by applicable regulations under the Emergency Price Control Act of 1942, as amended (50 U. S. C. App. 901, *et seq.*), may be maintained by the United States in its own name, or must be maintained in the name of the Secretary of Commerce.

EXECUTIVE ORDERS AND RULE INVOLVED

Executive Orders 9841 (12 F. R. 2645) and 9842 (12 F. R. 2646) are set forth in the Appendix, *infra*, pp. 46-54.

Rule 25(d) of the Federal Rules of Civil Procedure, as it read when the district court granted the motion to substitute the United States,[1] provided:

> (d) *Public Officers: Death or Separation From Office.*—When an officer of the United States, the District of Columbia, a state, county, city, or other governmental agency or any other officer specified in the

[1] Because of the repeal of 28 U. S. C. 780 and its omission from the 1948 version of 28 U. S. C., Rule 25(d) has been amended to eliminate the reference to that section and instead to enumerate specifically those governmental officers formerly referred to in the Rule by a general reference to the statutory provision.

Act of February 13, 1925, c. 229, § 11 (43 Stat. 941), U. S. C., Title 28, § 780, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object.

STATEMENT

The six cases here involved were brought in the United States District Court for the Northern District of Illinois under Section 205(e) of the Emergency Price Control Act of 1942 as amended (50 U. S. C. App. 925(e)), for the recovery of damages for sales allegedly at prices in excess of the maximum prices prescribed by applicable OPA regulations (R. 6-7, 34-37, 54-58, 74-78, 94-96, 112-114). Complaints against Allied Oil Corp., P. & M. Liquor Corp. and Nicro Steel Products,

Inc. were filed on July 10, 1944, November 1, 1944 and May 21, 1945, respectively, all in the name of Chester Bowles, Price Administrator (R. 6, 34, 54). Two complaints, those against Harvey, Inc. and Eva Metnick, were filed on April 26, 1946 and December 3, 1946, respectively, by Paul A. Porter, then Price Administrator (R. 74, 94). The complaint against Jack Stein and Harry Robins was filed April 15, 1947 by Philip B. Fleming, Temporary Controls Administrator (R. 112).[2] The complaint in each action expressly recited that the action was brought "for and on behalf of the United States."

Thereafter, in due course, the names of successor Price Administrators were substituted as plaintiff in each case within six months after the successor took office (R. 8, 38, 58-59, 79, 97).

The cases were pending in this posture when, on April 23, 1947, the President, in accordance with the direction of Congress (Urgent Deficiency Appropriation Act, 1947, 61 Stat. 14, 16), issued Executive Order 9841 (Appendix, *infra*, pp. 46-52) providing for the liquidation of the Office of Temporary Controls and distributing the functions which had been lodged, first, in the Price

[2] OPA Supplementary Order 193 (11 F. R. 13464) decontrolled, as of November 10, 1946, all the commodities of which overceiling sales were alleged in the six suits, but Section 1(b) of the Emergency Price Control Act (50 U. S. C. App. 901(b)) provided "that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense."

Administrator and, then, in the Office of Temporary Controls, among the Housing Expediter, the Secretary of Agriculture, the Reconstruction Finance Corporation, and the Secretary of Commerce. Also, on April 23, 1947, the President issued Executive Order 9842 relating to the conduct of certain litigation under wartime legislation and providing that as of June 1, 1947 (Appendix, *infra*, p. 53):

> 1. The Attorney General is authorized and directed, in the name of the United States, or otherwise as permitted by law, to coordinate, conduct, initiate, maintain or defend:
>
> * * * * *
>
> (b) Litigation against violators of regulations, schedules or orders relating to maximum prices pertaining to any commodity which has been removed from price control;
>
> * * * * *

Within six months of June 1, 1947, the effective date of the material provisions of the Executive Orders, the Government obtained orders from the district court substituting the United States as plaintiff in each case (R. 9, 39, 60, 79, 97, 115). Two and one-half years later, on January 9, 1950, the district court, upon motion of the defendants, determined that the United States was not the real party in interest and that the Secretary of Commerce was the real party in interest. Accordingly, orders were entered vacating the prior orders which had substituted the United States as plaintiff and dismissing the actions because the Secre-

tary of Commerce had not been timely substituted as plaintiff (R. 17-20, 39-42, 60-62, 80-82, 98-100, 119-121).

Upon the Government's appeals, the Court of Appeals for the Seventh Circuit held that, under Executive Orders 9841 and 9842, treble damage actions originally instituted in the name of the Price Administrator, as authorized by Section 205(e) of the Emergency Price Control Act, could be maintained, after the termination of the Office of Temporary Controls, the successor agency to the Office of Price Administration, only in the name of the Secretary of Commerce, and that the United States could not be substituted as party plaintiff in such actions (R. 128-132). The court, accordingly, affirmed the orders of the district court (R. 132).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the President was without authority to direct that these price control treble damage actions should be maintained in the name of the United States.

2. In construing Executive Orders 9841 and 9842 as directing that these actions be maintained in the name of the Secretary of Commerce.

3. In failing to hold that, if the Secretary of Commerce is the proper plaintiff, he might now be substituted.

4. In affirming the district court's dismissal of these actions.

SUMMARY OF ARGUMENT

The holding below that the treble damage actions, originally instituted by the Price Administrator on behalf of the United States and pending at the termination of the Office of Temporary Controls, must be maintained in the name of the Secretary of Commerce, rather than the United States, is based on a double error: (1) the court's erroneous assumption that the President was without power to direct that such suits be brought in the name of the United States, and (2) a misreading of Executive Orders 9841 and 9842.

I

The President, we submit, had the power to direct that these treble damage actions be continued in the name of the United States. Section 205(e) of the Emergency Price Control Act, stressed by the court below, does not preclude such direction by the President; that Section on its face merely authorized the Price Administrator to bring these actions and does not purport to require him to bring them in his own name rather than in the name of the United States, the real party in interest. Moreover, such power not only may be inferred from Section 1(b) of the Price Control Act, providing for the survival of these actions after the Price Administrator had ceased to exist, but also is plainly vested in the President by Section 1 of the First War Powers Act. These provisions, already invoked to support the President's trans-

fer of the Price Administrator's functions to the Temporary Controls Administrator (*Fleming* v. *Mohawk Co.*, 331 U. S. 111), clearly authorized the President to designate the United States *eo nomine*, as well as any governmental representative acting on its behalf, as a further successor to the Price Administrator for the purpose of maintaining these actions. In addition, the Price Administrator was nothing more than an *alter ego* of the United States with respect to price control matters. The Office of Price Administration was no different from any regular department or other establishment of the Government. In instituting these actions, the Price Administrator was performing purely governmental functions and was acting on behalf of the United States, as is expressly stated in Section 205(e) and the complaints here. The United States being the real party in interest, there is no obstacle to instituting such actions in its name or, as here, to substituting it as party plaintiff after the action had been begun by the Price Administrator.

II

The reading below of the Executive Orders not only stands alone, but is in square conflict with the plain language of Executive Order 9842. That Order explicitly vests authority in the Attorney General to maintain treble damage actions in the name of the United States; on the other hand, Sections 302 and 402 of Order 9841, the

provisions specifically relied on below, are by their own terms subordinated to these provisions of 9842. Moreover, the reading below creates a conflict between the provisions of the Executive Orders as to the furnishing of staff to handle the litigation; no conflict would result under our construction of the orders. Finally, since under its reading, the Secretary of Commerce's sole connection with these actions is the lending of his name as nominal plaintiff, the court below not only reached a capricious result but distorted the logical scheme of the orders whereby the maintenance of litigation was to be merely an adjunct to the transfer of some function to which the litigation is related. The construction of the orders which we urge is fully supported by the unanimous agreement among the Office of Temporary Controls, the Department of Justice, and Department of Commerce, the executive agencies involved, that the Executive Orders authorized the Attorney General to continue these suits in the name of the United States.

III

If this Court concludes that the Secretary of Commerce is the only proper plaintiff in these actions, we believe that the Court should direct that the Government now be permitted to substitute the Secretary of Commerce notwithstanding the expiration of the six-months' period specified in Rule 25 (d) of the Federal Rules of Civil Procedure.

The court below has previously held that Rule 25 (d) is applicable to actions for treble damages under Section 205 (e) of the Emergency Price Control Act. The Courts of Appeals for the Eighth, Ninth and Tenth Circuits have held, to the contrary, that Rule 25 (d) does not apply to actions brought on behalf of the United States and in which the United States has at all times been the sole real party in interest, and that the United States may be substituted as plaintiff in such cases without regard to the six-months' requirement of that Rule. We believe that the latter construction is both realistic and consistent with the history and purposes of Rule 25 (d), and should apply as well to the substitution of any proper nominal plaintiff representing the United States.

ARGUMENT

The holding below that these treble damage actions, although originally instituted by the Price Administrator on behalf of the United States, are now maintainable only in the name of the Secretary of Commerce, an official of the United States Government, but not in the name of the United States, raises only the narrow question as to the name in which those actions may be prosecuted on behalf of the United States. Even under the holding below, the sole relationship of the Secretary of Commerce to these actions is the use of his name as plaintiff; all other duties in regard thereto, the court below admitted (R. 131), were to be per-

formed—and in fact have been performed—by the Department of Justice under the Attorney General.

The court below purported to ground its holding that the Secretary of Commerce is the only proper party plaintiff in these actions (1) on the text of the Executive Orders, which the court below read as an "authoritative transfer [by the President] to the Secretary of Commerce of the remaining functions of price control, including the right to maintain actions such as these in his own name" (R. 130), and (2) on Section 205(e) of the Emergency Price Control Act (50 U. S. C. App. 925(e)), which authorizes the Price Administrator to institute these actions in his own name. The court construed Section 205(e) as requiring these actions to be instituted only in the name of the Price Administrator or his successor, and as precluding the President from directing the substitution, as plaintiff, of the United States *co[illegible]mine*, which the court held, in effect, could not be a successor to the Price Administrator.

This decision is, we submit, based on a double error. Point I deals with what, in our view, is the basic difficulty with the reasoning below, *i.e.*, the court's failure to recognize that the President had the power to direct that these actions be continued in the name of the United States, particularly since the United States—not the Price Administrator or the Secretary of Commerce—is, and always has been, the real party in interest. In

Point II, we show that once this is recognized the court's construction of the Executive Orders is without foundation in the text of the orders. In Point III, we urge that if this Court determines that the Secretary of Commerce is the only proper plaintiff in these cases, the Government should be permitted to substitute him as plaintiff notwithstanding the expiration of the six-months' period referred to in Rule 25 (d) of the Federal Rules of Civil Procedure.

I

The President May Provide That Pending Treble Damage Actions Be Maintained in the Name of the United States

Pervading and coloring the holding below that Executive Orders 9841 and 9842 did not provide for the substitution of the United States as party plaintiff in the pending treble damage actions is the premise that the Congress, by permitting the Price Administrator in Section 205(e) of the Emergency Price Control Act to institute these actions in his own name, precluded the President from directing, after the termination of the Office of Price Administration, that the remaining actions be maintained in the name of the United States. According to the court below (R. 131):

> Obviously the President could not create new causes of action or vest a new party with a right of action lodged by act of Congress in another; that could have been done only by the Congress. It would seem clear then, that a direc-

> tion by the President to conduct suits in the name of the United States, when Congress had provided that the administrator or his successor should have this right, would be beyond the Executive's power.

This premise, we submit, has no merit.

In the first place, Section 205(e) does not purport to require the Price Administrator to institute in his own name treble damage actions such as here involved. That Section provides in pertinent part as follows:

> If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, *the Administrator may institute such action on behalf of the United States* within such one-year period. [Italics supplied.]

This provision on its face merely authorizes the Price Administrator to bring these actions; nothing in its text supports the inference that such actions must be brought in the name of the Price Administrator rather than in the name of the United States.

Secondly, assuming for the moment that the Price Administrator has an interest in the litigation separate and distinct from that of the United

States, it does not follow that designating the United States as the party to be substituted as plaintiff in these treble damage actions would involve an unauthorized attempt by the President to "vest a new party with a right of action lodged by act of Congress in another" (R. 131). For there can now be no doubt, as even the court below appears to admit,[3] that the President has the power to designate a successor to the Price Administrator for the purpose of continuing these actions after the termination of the Office of Price Administration.

Section 1(b) of the Emergency Price Control Act (50 U. S. C. App. 901(b)), relating to the Act's termination date, provides that:

> as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act * * * shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

This provision, were it standing alone, would warrant an inference that such power of designating a successor resided in the President, for Congress by providing that the causes of action

[3] The recognition below of the President's power so to designate a successor is manifest not only from the quotations from the court's opinion, *supra*, pp. 11, 12-13, but also from the court's construction of Executive Orders 9841 and 9842 as a designation by the President of the Secretary of Commerce as the successor to the Price Administrator, for the purpose of continuing these actions in his name.

and the right to maintain them should remain alive after the Price Administrator designated in the statute to institute and maintain these actions had ceased to exist, obviously intended that some agency or department within the Executive should be charged with the enforcement of these causes of action.

However, it is unnecessary to rely solely on inference. Executive Orders 9841 and 9842 concerned "matters relating to the conduct of the present war" and were promulgated by the President within six months after "the termination of the war." Cf. *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 115-116. Consequently, the President's designation of the United States in these Orders was within the broad powers vested in him by Section 1 of the First War Powers Act (55 Stat. 838, 50 U. S. C. App. 601), which Section authorized the President:

> to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, governmental corporation, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this title and to this end is authorized to make such regulations and to issue such orders as he may deem necessary * * *.

On the basis of these provisions, this Court in *Fleming* v. *Mohawk Co.*, 331 U. S. 111, has already

rejected contentions similar in their nature and effect to the holding below. In the *Mohawk* case, the Court sustained, as within his power, the President's transfer by Executive Order 9809 (11 Fed. Reg. 14281) of the Price Administrator's functions to the Temporary Controls Administration, and accordingly held that the Temporary Controls Administrator was properly substituted for the Price Administrator as the party plaintiff in the treble damage actions there involved. By the same token, we submit, the President has the authority to designate the United States *eo nomine*, as well as any governmental representative acting on behalf of the United States, as a further successor to the Price Administrator for the purpose of maintaining the present actions beyond the termination date of the Office of Temporary Controls.

Finally, the fact is that the Price Administrator had no interest separate and distinct from the United States, but rather was an *alter ego* of the United States with respect to price control matters. Consequently, a Presidential direction that these actions should be continued in the name of the United States would not involve attempting to "vest a new party with a right of action lodged by act of Congress in another" (R. 131), but rather would result in the continuation of the same action by the real party in interest.

The Office of Price Administration, of which the Price Administrator was the head, was merely an

administrative agency of the Government, created by Congress in Section 201(a) of the Emergency Price Control Act (50 U. S. C. App. 921(a)), for the purpose of administering the price control aspect of the Government's anti-inflation program. The Price Administrator himself was appointed by the President by and with the advice and consent of the Senate. See Section 201(a). His appointment of employees was subject to the civil-service laws, and all funds for operation of the agency, including payment of salaries, were furnished by Congress by annual appropriations. The Office of Price Administration was actually no different from any regular department or other establishment of the Government. The use of a name other than the United States was purely a convenient designation for a governmental agency charged with the administration of the Price Control Act, and in no way altered the basic governmental nature of the Office. As this Court stated in regard to another such agency, "In short, it [was] an integral part of the governmental mechanism. And the use of a name other than that of the United States cannot change that fact." *United States* v. *Remund*, 330 U. S. 539, 542; see, also, *Herren* v. *Farm Security Administration*, 153 F. 2d 76, 77-78 (C. A. 8); *Korman* v. *Federal Housing Administrator*, 113 F. 2d 743 (C. A. D. C.); *In re Hansen Bakeries*, 103 F. 2d 665, 666 (C. A. 3); *North*

Dakota-Montana Wheat Growers' Ass'n. v. *United States,* 66 F. 2d 573 (C. A. 8).

Moreover, although the Price Administrator instituted these treble damage actions in his own name, he was thereby discharging a governmental function, and, accordingly, acting on behalf of the United States. This is clear not only from the fact that these suits were authorized as one of the sanctions for obtaining compliance with the provisions of the Price Control Act in the public interest, but also from the very provisions of Section 205(e). That Section, in authorizing the Price Administrator to institute these actions, specifically directed that they be instituted "on behalf of the United States." And in conformance therewith, the complaints in the present actions were entitled in the name of the Administrator "for and on behalf of the United States," and judgment was demanded against the defendants "for and on behalf of the United States." See, *e.g., Larson* v. *Domestic and Foreign Corp.,* 337 U. S. 682, 686; *Louisiana* v. *McAdoo,* 234 U. S. 627, 629; *Seven Oaks* v. *Federal Housing Administration,* 171 F. 2d 947 (C. A. 4). Clearly, therefore, the Price Administrator "was not authorized to bring [these actions] on his own behalf." (*Fleming* v. *Goodwin,* 165 F. 2d 334, 338 (C. A. 8), certiorari denied *sub nomine Goodwin* v. *United States,* 334 U. S. 828), and he was "no more than a nominal plaintiff * * *. The United States, on behalf of which the action was brought, was

the real plaintiff. * * * Whether the action is maintained by an official authorized to sue on its behalf, or by the United States in its own name, the real plaintiff remains the same." *United States* v. *Koike*, 164 F. 2d 155, 157 (C. A. 9). See, also, *Northwestern Lumber & Shingle Co.* v. *United States*, 170 F. 2d 692, 694 (C. A. 10); *Porter* v. *Maule*, 160 F. 2d 1, 3 (C. A. 5); *Bowles* v. *Goldman*, 7 F. R. D. 12 (W. D. Pa.); *United States* v. *Saunders Petroleum Co., Inc.*, 7 F. R. D. 608 (W. D. Mo.); *Porter* v. *American Distilling Co.*, 71 F. Supp. 483, 488 (S. D. N. Y.).[4]

Thus, the United States has always been the real plaintiff—the real party in interest—in treble damage actions such as those here involved. And as the real party in interest, the United States could have instituted these actions in its own name, notwithstanding the fact that the Act permitted the Administrator to name himself as plaintiff. See *United States* v. *Summerlin*, 310 U. S. 414; *United States* v. *Remund*, 330 U. S. 539; *Cherry Cotton Mills* v. *United States*, 327 U. S. 536; *Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 524; *Federal Housing Administration* v. *Burr*, 309 U. S. 242, 249-250. In the *Summerlin* case, where the Government sought to assert, in the name of the

[4] The other provisions of Section 205 stressed by respondents (Br. in Opp. 8-9), do not demonstrate that the interest of the Price Administrator was separate and distinct from the United States. These provisions merely deal with the allocation of duties within the Executive and do not destroy the essential identity of the Price Administrator and the United States.

United States, a claim assigned to the Federal Housing Administrator who was authorized "in his official capacity, to sue and be sued in any court of competent jurisdiction" (12 U. S. C. 1702), the Court stated (310 U. S. at 416):

> The claim assigned to the Federal Housing Administrator acting on behalf of the United States became the claim of the United States, and the United States thereupon became entitled to enforce it.

Similarly, in the *Remund* case, the question related to whether the priority accorded by R. S. 3466 (31 U. S. C. 191) in a decedent's estate to debts owed to the United States applied to claims filed in the name of the Governor of the Farm Credit Administration on notes executed to him; the Court there held that the debts were owed to the United States, and further that it is immaterial whether the claim be filed in the name of the United States or the name of the officer or agency; "in the latter instance, the claim is necessarily filed on behalf of the United States and the legal effect is the same as if it had been filed in that name. * * * The claim was filed in the name of the Governor of the Farm Credit Administration 'for and on behalf of the United States of America'—an explicit recognition of the legal realities involved." 330 U. S. at 542-543. And in *Cherry Cotton Mills,* the Court held that the claim of the

Reconstruction Finance Corporation could be asserted as a counter-claim "on the part of the Government of the United States" within the meaning of the then 28 U. S. C. 250(2) (now 28 U. S. C. 1503, as revised); "that the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is, an agency selected by Government to accomplish purely governmental purposes." 327 U. S. at 539.

The substitution of the United States as party plaintiff in these enforcement actions, accordingly, does not involve the creation of new causes of action nor the vesting of a new party with the right of action lodged in another, as the court below held (R. 131), but rather the continuation of the same action by the real party in interest. And since no change in the cause of action is thereby affected and the defendant is in no way prejudiced, there would seem to be no obstacle to substituting the United States as plaintiff, after the action has been begun by the Price Administrator. Cf. *State of Nebraska* v. *Hayden*, 89 Fed. 46 (C. C. D. Neb.); *Winthrop* v. *Farrar*, 11 Allen (93 Mass.) 398, 400; *Lake Shore and M. S. Railway Company* v. *City of Elyria*, 69 Ohio St. 414; cf. *Irving Trust Company* v. *American Silk Mills, Inc.*, 72 F. 2d 288, 290 (C. A. 2), certiorari denied, 293 U. S. 624. This, of course, would be consistent with the general purposes sought to be attained by Rules

45(a), (b), 17(a), and 21 of the Federal Rules of Civil Procedure.

Based on considerations such as we have just set out, a number of courts of appeals, particularly those for the Eighth, Ninth, and Tenth Circuits have held, as stated by the Eighth Circuit that treble damage actions such as those at bar are "in substance and reality, at all times a controversy between the Government and [respondents]", warranting the substitution of the United States as plaintiff. *Fleming* v. *Goodwin*, 165 F. 2d 334, 338 (C. A. 8), certiorari denied *sub nomine Goodwin* v. *United States*, 334 U. S. 828; *United States* v. *Koike*, 164 F. 2d 155 (C. A. 9); *Northwestern Lumber and Shingle Co.* v. *United States*, 170 F. 2d 692 (C. A. 10).[5] In these circumstances, permitting these actions to continue in the name of the United States, "is not technically a matter of making a new party at all" (*United States* v. *Koike*, *supra* at 157 (C. A. 9)), but "merely amounted to the substitution of the United States, the real party in interest, as the party plaintiff" (*Northwestern Lumber & Shingle Co.* v. *United States*, 170 F. 2d 692, 694 (C. A. 10)). "The only purpose of substitution in such a case is to keep the record straight so that the judgment finally entered

---

[5] See also, *Ralph D'Oench Co.* v. *Woods*, 171 F. 2d 112 (C. A. 8); *Seven Oaks* v. *Federal Housing Administration*, 171 F. 2d 947 (C. A. 4); *Porter* v. *Steger*, 74 F. Supp. 109, 113 (D. Md.); *Fleming* v. *People's Natural Gas Co.*, 8 F. R. D. 42, 45 (W. D. Pa.); cf. *Porter* v. *Maule*, 160 F. 2d 1, 3 (C. A. 5).

will unquestionably bind the right parties." *Fleming* v. *Goodwin*, *supra* at 338. Accordingly, the substitution of the United States as party plaintiff "amounts to nothing more than a formal amendment to the title of the action to conform it to the truth" (*ibid.*).

Bowles v. *Wilke*, 175 F. 2d 35 (C. A. 7), certiorari denied, 338 U. S. 861, relied on by the court below (R. 130) as well as by respondents (Br. in Opp. 7-8), is distinguishable from the cases at bar; the language of the court's opinion, if anything, would appear to support the Government's position here. That case involved a treble damage action originally brought in the name of Chester A. Bowles, as Price Administrator, in which the successor Price Administrators had not been substituted within six months, as thought to be prescribed by Rule 25(d) of the Federal Rules of Civil Procedure. As stated by the court, the sole issue before it was "whether the action had abated due to the failure of Bowles' successor to make timely application for substitution" (175 F. 2d at 38), and in answering that question in the affirmative,[6] the court made the statement quoted by respondents (Br. in Opp. 7-8). The court in this statement does not deny that the United States was the real party in interest in such cases, but rather adopts the view that irrespective of that fact, Rule 25(d)

---

[6] The Government believes that the court's decision on this issue is erroneous. See *infra*, pp. 37-44.

is applicable. Morever, in holding Rule 25(d) to be applicable, the court attempted to distinguish several of the cases cited, *supra*, pp. 22-23, in which the United States had been permitted to be substituted, not on the ground that such substitution was improper, as the court has now held, but rather on the ground that in those cases the substitution of the United States as the Price Administrator's successor had been timely. 175 F. 2d at 39-40. Since the substitution of the United States in the instant cases was within the prescribed period, it would follow, on the basis of the court's distinction in the *Wilke* case, that these actions should not have been dismissed as abated.

II

Executive Orders 9841 and 9842 Authorized the Substitution of the United States, Not the Secretary of Commerce, as the Party Plaintiff in Pending Treble Damage Actions

The reading below of the Executive Orders, as designating the Secretary of Commerce to be the plaintiff to be substituted in the pending treble damage actions, is predicated on selected excerpts from Sections 302 and 402 of Executive Order 9841. (R. 130, see Br. in Opp. 4). According to the court below, Section 302 directed "that all price control functions theretofore vested in the Temporary Controls Administrator should be 'transferred to the Secretary of Commerce'" (R. 130). The court goes on to point out that

Section 402 provides that "such transfer of functions should include 'authority on the part of each officer to whom such functions are transferred * * * to *institute, maintain, or defend in his own name* civil proceedings in any court * * * relating to the matters transferred to him, including any such proceedings pending on the effective date of the transfer' of functions to him" (emphasis supplied by court) (R. 130). Accordingly, the court concluded that Executive Order 9841 transferred to the Secretary of Commerce "the remaining functions of price control" (R. 130), including maintenance of the pending treble damage actions in his name.

This holding stands alone among the several cases in which the lower federal courts have had occasion to examine these Executive Orders; in all other cases the courts have uniformly held that these Executive Orders vest authority in the Attorney General to maintain the pending treble damage actions in the name of the United States. *Hal-Mar Dress Co.* v. *Clark, Director, Division of Liquidation, Department of Commerce*, 165 F. 2d 222 (E. C. A.); *Fleming* v. *Goodwin*, 165 F. 2d 334, 338 (C. A. 8), certiorari denied *sub nom. Goodwin* v. *United States*, 334 U. S. 828; *Porter* v. *Steger*, 74 F. Supp. 109, 113 (D. Md.); *Fleming* v. *People's Natural Gas Co.*, 8 F.R.D. 42, 45 (W. D. Pa.); cf. *United States* v. *Koike*, 164 F. 2d 155 (C. A. 9).

In the *Hal-Mar Dress* case, the Emergency Court of Appeals had before it a petition to review a determination made under Section 205(e) of the Emergency Price Control Act by the Department of Commerce's Director of the Division of Liquidation.[7] On that petition, the Emergency Court held that it had no jurisdiction to review the "purported determination" because the Director had no power to make the determination. This power, the court noted, went with the power to maintain the related treble damage action under that Section. On a careful examination of the Executive Orders, the court ruled that the power was the Attorney General's (165 F. 2d at 224):

> It appears that the Attorney General has taken over from the Temporary Controls Administrator the conduct of the suit for treble

---

[7] The *Hal-Mar Dress Co.* case involved that part of Section 205 (e) (added by Section 12 of the Price Control Extension Act of 1946, 60 Stat. 677) which provides that:

> The Administrator shall not institute or maintain any enforcement action under this subsection against any manufacturer of apparel items where the Administrator shall determine (1) that the transactions on which such proceeding is based consisted of the manufacturer's selling such an item at his published March 1942 price list prices instead of his March 1942 delivered prices, and (2) that the seller's customary pricing patterns for related apparel items would be distorted by a requirement that his ceilings be the March 1942 delivered prices. The Administrator's determinations under this paragraph shall be subject to review by the Emergency Court of Appeals in accordance with sections 203 and 204.

Thus, the question in the case was whether the power to make such determinations was vested in the Secretary of Commerce or in the Attorney General.

damages for violation of Maximum Price Regulation 287 which had been instituted against the defendant * * *. This was the suit brought under Section 205(e) with respect to which the determination here in question was sought. In that suit, on the Attorney General's motion, the United States has been substituted as plaintiff in place of the Temporary Controls Administrator. It will thus be seen that the Attorney General is presently engaged in maintaining that suit pursuant to the authority conferred on him by Executive Order 9842.

If, as is evident, the Attorney General has succeeded to the Administrator's function of maintaining the suit he has necessarily acquired also the discretionary authority to settle or dismiss it.

* * * * * *

Our conclusion is that the duty to make the determination called for by the last paragraph of Section 205(e) was transferred to the Attorney General under Executive Order 9842 and, therefore, did not pass to the Secretary of Commerce under the residuary clause of Paragraph 302 of Executive Order 9841. It follows, as stated at the outset, that the Director of the Division of Liquidation of the Department of Commerce, whom the Secretary of Commerce designated to perform his functions under Executive order No. 9841, had no authority to make the determination here sought to be reviewed.

Even the court below had previously read the Executive Orders to provide for maintenance of these actions in the name of the United States. In *Bowles* v. *Wilke*, 175 F. 2d 35 (C. A. 7), certiorari denied, 338 U. S. 861, in an opinion written by Judge Lindley, who wrote the opinion here, the court stated (175 F. 2d at 36):

> The President, on April 23, 1947, by Executive Order 9841 * * * terminated the Office of Temporary Controls as of June 1, 1947, and issued Executive Order 9842 * * * effective June 1, 1947, under which *the Attorney General was authorized in the name of the United States to conduct, initiate, maintain or defend actions under the Emergency Price Control Act* * * *. [Italics supplied.][8]

That the holding below is wrong and the court's prior reading of the Executive Orders is correct may easily be demonstrated. Executive Order 9842, which was issued contemporaneously with Order 9841 and which must read in conjunction therewith, in plain language vests authority in the Attorney General to maintain the treble damage actions in the name of the United States. That Order specifically provides (Appendix, *infra*, p. 53):

> 1. The Attorney General is authorized and directed, in the name of the United States or

---

[8] See also *supra*, pp. 23-24.

otherwise as permitted by law, to coordinate, conduct, initiate, maintain or defend:

(a) Litigation before the Emergency Court of Appeals for and on behalf of the Secretary of Agriculture, the Secretary of Commerce, and the Reconstruction Finance Corporation, respectively;

(b) Litigation against violators of regulations, schedules or orders relating to maximum prices pertaining to any commodity which has been removed from price control;

* * * * *

Subparagraph (b) clearly refers to OPA enforcement suits, is not limited to criminal proceedings, and thus is applicable to the instant cases. Furthermore, that subparagraph, unlike the preceding subparagraph (a), does not direct the Attorney General to conduct the litigation on behalf of any specified officers and, consequently, he is authorized to conduct such litigation "in the name of the United States or otherwise as permitted by law" as provided in paragraph 1.[9]

[9] Respondents' contention, that the phrase "or otherwise as permitted by law" limits the scope of the authorization to the Attorney General to maintain these actions in the name of the United States (Br. in Opp. 4-5), is based on the holding below that Section 205(e) sanctions such suits only in the name of the Price Administrator or his successor. This holding, we have demonstrated *supra*, pp. 13ff., is erroneous and hence does not support respondents' position. We read this phrase not to limit but rather to broaden the Attorney General's authority, by permitting him to maintain these actions in the name of the United States, or if he chooses, in any other name permitted by law.

In addition, it should be pointed out that both Sections 302 and 402 of Order 9841 were expressly made subject to the Order 9842, but Order 9842 contains no comparable limitation. Section 302 vests in the Secretary of Commerce not *all* of the price control functions theretofore discharged by the Temporary Controls Administrator, as the court below held (R. 130), but only residual functions, functions which in the words of Section 302, were "not otherwise disposed of by statute or by this or any other Executive Order." This language excludes from the Commerce Secretary's authority not only the price control functions specifically distributed by Section 202 of Order 9841 among the Housing Expediter, the Secretary of Agriculture and the Reconstruction Finance Corporation (see *supra*, pp. 4-5, *infra*, pp. 47-52), but—more important here—the functions vested in the Attorney General by Order 9842. Section 402 is similarly subordinated to Order 9842; the concluding sentence of that section reads:

> The provisions of this paragraph shall be subject to the provisions of the Executive order entitled "Conduct of Certain Litigation Arising under Wartime Legislation" issued on the date of this order and effective June 1, 1947.

When these contemporaneous Orders are thus read in conjunction, we think that the conclusion becomes inescapable that the Orders directed that

the pending OPA enforcement suits be maintained in the name of the United States rather than in the name of the Secretary of Commerce.

There are also several more reasons why in our view the conclusion below is erroneous. In the first place, Section 302 provides that all functions thereby transferred to the Commerce Secretary "shall be performed by him or, subject to his direction and control, by such officers or agencies of the Department of Commerce as the Secretary may designate." Section 402 defines functions as including authority on the part of each officer to whom such functions are transferred under the Order "to institute, *maintain*, or *defend* in his own name civil proceedings in any court * * * relating to the matters transferred to him * * *." (Italics supplied.) Accordingly, if the court below were correct in holding that Sections 302 and 402 vested authority in the Secretary of Commerce in regard to the pending treble damage actions, it would follow that the Secretary of Commerce would not only be authorized to institute an action in his own name but also so to maintain and defend these actions, and in addition, he would be charged with the furnishing of the staff to handle this litigation.[10] But,

---

[10] The task of handling and trying the approximately 4000 enforcement cases pending (*infra*, p. 36, fn. 13) was far too great for the limited legal staff of the Commerce Department. In 1947, there were eleven attorneys, including the Solicitor, in the Solicitor's Office. *The Budget of the United States, for the fiscal year ending June 30, 1949*, p. 404. In 1948, the number was reduced to nine. *The Budget of the United States, for the fiscal year ending June 30, 1950*, p. 425.

as even the court below agreed, Order 9842, at the very least, directed "that the Department of Justice should furnish the staff of manpower, i.e., legal and investigating personnel, necessary effectively to prosecute 'price control enforcement litigation,' in lieu of conduct of such litigation by the staff of the Office of Price Administration." (R. 131). The conflict between these provisions of the Executive Orders comes into being only if one accepts the construction of the Orders given below; no such conflict would result under the construction of the Orders which we have urged *supra*, pp. 24-31.

Moreover, in undertaking to resolve the conflict in favor of Order 9841 and holding that the Department of Justice was to furnish the staff to handle the enforcement cases as replacement for the Price Administrator's staff, the court below accorded only limited recognition to Order 9841's express subjection to Order 9842. There is, however, no basis in the Executive Orders for thus limiting the extent to which 9841 is subordinated to 9842, nor, for that matter, for the resulting division of duties in regard to the pending treble damage actions. The same reasoning which led the court below to recognize even this limited subordination requires that 9841 be completely subjected to 9842, and hence that the authorization in Section 402 to institute

---

These figures do not, of course, include attorneys employed by various agencies of the Department such as Civil Aeronautics Administration, Office of International Trade, etc. These attorneys, however, would obviously not be available for the prosecution of OPA enforcement suits.

the action in the name of the head of the administrative agency be held subject to Order 9842. Further militating against the court's holding is the fact that its analogy between the Department of Justice attorneys and the Price Administrator's staff (R. 131) is inappropriate since the relationship between the Department of Justice and the Secretary of Commerce is very different from that between the Price Administrator and his staff. The legal and investigative staff of the Office of Price Administration was subject to the supervision of the Price Administrator who could review their actions. The Attorney General, on the other hand, stands on an equal footing with the Secretary of Commerce and by virtue of paragraph 2 of Order 9842,[11] the Attorney General has complete control over the disposition of this litigation.

An additional difficulty with the construction below is that it is inconsistent with, and distorts the logical scheme of, Section 402 whereby the maintenance of litigation was to be merely an adjunct to the transfer of some function to which the litigation related. The power to sue for damages and injunctions, to compromise or refuse to compromise, is an important and effective aid in the administration of a substantive program. For such reasons, the Price Administrator, under the

---

[11] Paragraph 2 provides:

> Nothing herein shall be deemed to restrict or limit the powers conferred upon the Attorney General by law with respect to the conduct, settlement, disposition or review of litigation.

Emergency Price Control Act, was given complete control over the civil litigation instituted by him under the Act. So, also, under Order 9841, the transfer of administrative functions was accompanied by the authority to conduct related litigation. See, for example, *Ralph D'Oench Co.* v. *Woods*, 171 F. 2d 112, 114 (C. A. 8). But, with respect to decontrolled commodities such as are involved in these cases, the only thing left to do was to dispose of the suits, and as already pointed out, *supra*, pp. 24-29, 32-33, that power was lodged in the Attorney General by Executive Order 9842. Hence, in regard to such cases, the Secretary of Commerce was vested neither with any functions to which this litigation related, nor, consequently, with authority to maintain the litigation. Under the holding below, the Secretary of Commerce's sole relationship to the treble damage actions was that of lending the use of his name as nominal plaintiff.

Finally, the construction is objectionable for the reason that it reaches a capricious result. The court below, in denying that the result was capricious, commented that "it was not illogical, when the Office of Price Control was abolished, to transfer its activities to the Department of Commerce, for sales in excess of ceiling prices are a part of commerce." (R. 131). But as we have already pointed out, even under the holding below, nothing was transferred to the Secretary of Commerce other than the right to have the suits conducted in

his name as nominal plaintiff. In addition, while the sales when made were undoubtedly a part of commerce, what we are concerned with here are enforcement functions in regard thereto. Cf. *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 117. Such functions are generally discharged by the Attorney General and not the Secretary of Commerce.

Supporting our construction of the Executive Orders that the Secretary of Commerce was not intended to have any connection—not even as nominal plaintiff—with the civil litigation in regard to decontrolled commodities is the fact that it accords with the unanimous understanding of the executive agencies affected, the Office of Temporary Controls, the Department of Justice and the Department of Commerce. The Temporary Controls Administrator stated to the Attorney General in a letter dated April 30, 1947, one week after the issuance of the Executive Orders and before their June 1, 1947 effective dates, that his understanding of the Executive Orders was that:

> 1. The Department of Justice will undertake the task of completing the O.P.A. litigation program, so far as decontrolled commodities are concerned, such litigation to be conducted in the name of the United States of America.[12]

And in accordance with this understanding he transferred the files of the pending cases not to the

---

[12] The full text of this letter is set out in Appendix B, *infra*, pp. 54-56.

Department of Commerce but to the Department of Justice. The Department of Justice received these files and on May 19, 1947, in anticipation of the effective date, the Attorney General issued Circular 3987 to all United States Attorneys advising them:

> * * * In all OPA cases both in District Court and on appeal, substitute the United States as plaintiff on June 1, 1947, or as soon thereafter as possible.

The Secretary of Commerce has not disagreed with this procedure; he has at no time requested the files, sought to assert jurisdiction over them or over the conduct of the cases, nor has he ever claimed that he properly was, or should have been, substituted as party plaintiff. Indeed, the initial report of the Department of Commerce, Division of Liquidation, states (Interim Program Report of the Division of Liquidation, Department of Commerce, June 1, 1947—September 30, 1947, p. 3):

> A supplementary action was taken in Executive Order 9842, also dated April 23, 1947, which transferred responsibility for continuing (to its conclusion) the OPA enforcement program to the Justice Department.[13]

[13] The report further states (p. 5):

> The transfer of the OPA enforcement function to the Department of Justice involved transmitting approximately 4000 active enforcement cases for prosecution. These cases accounted for 1500 cubic feet of records. At that time also there were 28 price cases pending in the Emergency Court. No personnel were transferred to the Justice Department with this work load.

Such administrative construction of these Executive Orders, consistent and generally unchallenged, is entitled to great weight since it involves a contemporaneous construction by those charged with administering the orders. Cf. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315; *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 549. This is particularly true here, since the Executive Orders undoubtedly were issued as a formalization of agreements, resulting from discussion among the agencies involved and the President, as to the allocation of the functions of the then-to-be liquidated Office of Temporary Controls. Cf. *United States* v. *American Trucking Assns., Inc., ibid.*[14]

III

Rule 25 (d) of the Federal Rules of Civil Procedure Is Inapplicable to Treble Damage Actions Instituted by the Price Administrator on Behalf of the United States Under Section 205 (e) of the Emergency Price Control Act

If the decision below that the Secretary of Commerce is the proper party is affirmed, the large group of treble damage suits typified by these cases will be terminated, unless this Court determines that the Government may now substitute the Secretary as the nominal plaintiff notwithstanding the fact that the six-month period specified in Rule 25 (d) of the Federal

[14] Respondent's contention that reversal of the holding below is precluded by 28 U. S. C. 2105 (Br. in Opp. 11-14) has already been rejected by this Court in *Snyder* v. *Buck*, 340 U. S. 15, 21-22, 31-32.

Rules of Civil Procedure has expired. We contend, therefore, that the requirements of Rule 25 (d) do not apply to the substitution of the United States as plaintiff in actions commenced pursuant to statutory authority in the name of a government officer on behalf of the United States. Accordingly, if this Court holds that the Secretary of Commerce, rather than the United States, should be substituted as plaintiff in these cases, we believe that it should provide that the Government may now substitute the Secretary of Commerce as plaintiff. It has been pointed out (*supra*, pp. 12-24) that the United States, not the Price Administrator, was the real party in interest in these actions, and that they could have been instituted in the name of the United States rather than in the name of the nominal plaintiff—the Price Administrator. Nevertheless, the court below has already held in *Bowles* v. *Wilke*, 175 F. 2d 35, which was followed here, that Rule 25 (d) is applicable in OPA treble damage actions originally instituted by the Price Administrator, and that substitutions must be accomplished within the six-months period prescribed by that rule.

We believe, as was stated in our petition in the *Wilke* case (see Petition for a Writ of Certiorari, No. 299, Oct. Term, 1949, pp. 6-7), that that case glorifies "form over substance and reality" and is in square conflict with decisions on this precise point by three other courts of appeals. *Fleming* v. *Goodwin*, 165 F. 2d 334 (C. A. 8), certiorari

denied *sub nom. Goodwin* v. *United States*, 334 U. S. 828; *United States* v. *Koike*, 164 F. 2d 155 (C. A. 9); *Northwestern Lumber & Shingle Co.* v. *United States*, 170 F. 2d 692 (C. A. 10).[15] The reason why we believe Rule 25(d) to be inapplicable here is that we are concerned not with substituting a successor in office, as to which Rule 25(d) is applicable, but rather with the question whether an action commenced pursuant to statutory authority in the name of a government officer on behalf of the United States may be continued in the name of the United States, or in the name of another official on behalf of the United States. Substitution in such an action need not, we submit, comply with the requirements of Rule 25(d), which is concerned solely with cases in which the United States theoretically has no direct interest and in which it is not the real party in interest.[16]

---

[15] See, also, *Porter* v. *Maule*, 160 F. 2d 1 (C. A. 5); *Ralph D'Oench Co.* v. *Woods*, 171 F. 2d 112 (C. A. 8); *Seven Oaks* v. *Federal Housing Administration*, 171 F. 2d 947 (C. A. 4); *United States* v. *Seigel*, 168 F. 2d 143, 147 *et seq.* (C. A. D. C.), (Judge Edgerton dissenting); *Porter* v. *Pure Oil Co.*, 7 F. R. D. 577 (E. D. Pa.); *Fleming* v. *People's Natural Gas Co.*, 8 F. R. D. 42 (W. D. Pa.). Moreover, in entering final judgment in *Bowles* v. *Babar*, 54 F. Supp. 453, 455 (E. D. Mich.), the court, on its own motion, substituted Chester Bowles for Prentiss Brown as Price Administrator "for orderliness of this record." Indeed, in several federal district courts, general orders of substitution in OPA treble damage action were issued. See, *e. g.*, *Bowles* v. *Weiner*, 6 F. R. D. 540 (E. D. Mich.); *Bowles* v. *Goldman*, 7 F. R. D. 12 (W. D. Pa.); *In re Creedon*, 7 F. R. D. 546 (W. D. N. Y.); *Porter* v. *Sands*, 74 F. Supp. 494 (E. D. N. Y.).

[16] *Fleming* v. *Mohawk Co.*, 331 U. S. 111, relied on by the

The history of Rule 25(d) supports this conclusion. Rule 25(d) is the modern version of legislation originally adopted (Act of February 8, 1899, c. 121, 30 Stat. 822) at the suggestion of this Court in *United States ex rel. Bernardin* v. *Butterworth*, 169 U. S. 600. In that case, this Court had held that a suit to compel the Commissioner of Patents to issue a patent was abated by the death of the Commissioner and that it could not be revived in the name of his successor, even with the latter's consent. This principle was applied in suits where the action of the government official involved was personal in nature and the officer was required personally to perform his official duties. At the same time, it had also been held that where the duty involved was not personal but rather was an adjunct to a continuing office, the suit would not abate upon the incumbent's departure from the office. For example, in *Thompson* v. *United States*, 103 U. S. 480, it was held that a suit against a township clerk, which in reality was a suit against the township to enforce collection of a judgment, did not abate upon the resignation of the clerk. See, also, *Murphy* v. *Utter*, 186 U. S. 95; *In re Hollon Parker*, 131 U. S. 221; *Commissioners* v. *Sellew*,

---

Seventh Circuit in the *Wilke* case is inapplicable here. The question there was whether there had been compliance with Rule 25(d); no question was raised whether such compliance was necessary for the further maintenance of the action. Cf. *Fleming* v. *Goodwin*, 165 F. 2d 334, 338 (C. A. 8), certiorari denied *sub nomine Goodwin* v. *United States*, 334 U. S. 828.

99 U. S. 624. When, as here, the suit is brought by a named officer on behalf of the United States, the suit is, of course, not a personal action falling within the rule of the *Butterworth* case.[17]

In the *Butterworth* case, this Court recognized the distinction between these two situations (169 U. S. at 603, 604), and in there holding the cause to be abated because the duty was personal, the Court suggested (169 U. S. at 605):

> In view of the inconvenience, of which the present case is a striking instance, occasioned by this state of the law, it would seem desirable that Congress should provide for the difficulty by enacting that, *in the case of suits against the heads of departments abating by death or resignation,* it should be lawful for the successor in office to be brought into the case by petition, or some other appropriate method. [Italics supplied.]

To meet this suggestion, H. R. 6901, entitled "a bill to prevent the abatement of certain actions,"

---

[17] *Snyder* v. *Buck*, 340 U. S. 15, is, we believe, distinguishable from the instant cases and falls within the *Butterworth* line of cases. In the *Snyder* case, plaintiff instituted a suit for a mandatory injunction against Admiral Buck, Paymaster General of the Navy, requiring him to pay a death gratuity claimed to be due plaintiff under applicable statutes but failed to substitute Admiral Buck's successor within six months after he had taken office. Though the Court held that the suit was not "against Buck personally" (340 U.S. at 18), in the sense that it did not seek money from him in his personal capacity, the Court did not depart from the *Butterworth* case which held that in these mandamus suits "the duty is personal with the officer" and "the delinquency charged is personal." 169 U.S. at 603-4.

was introduced shortly thereafter. 31 Cong. Rec. 779. The purpose of this bill, as explained in the House Committee report (H. Rep. No. 960, 55th Cong., 2d sess.) and by the member of the House who reported the bill from the Committee (31 Cong. Rec. 3865-3866) was to permit the suit to survive and avoid the necessity of compelling a party to commence a new action against the successor in office. The Act, as then enacted, was not intended to affect—nor was there any need to affect—the situation where the departure of the named officer from office did not result in abatement. *Murphy* v. *Utter*, 186 U. S. 95, 101-102; *Marshall* v. *Dye*, 231 U. S. 250, 255; *Irvin* v. *Wright*, 258 U. S. 219, 224. In *Fleming v. Goodwin, supra*, the court of appeals stated (165 F. 2d at 337):

> The purpose of the Rule, like that of the statute which it superseded, was to provide for the continuance of an action, personal in character, brought by or against a public officer, where a substantial need for continuing the action existed and the action could not, without statutory authority, be maintained against his successor after the officer had ceased to hold office. The statute therefore was intended to cover only such actions, to which a public officer was a party, as would abate upon his separation from office. The need for the statute did not arise out of the death or resignation of Government officers who had brought actions on behalf of the Government. Such a statute was needed because

> the Supreme Court had ruled, in a number of cases, that actions brought against public officers to compel personal performance of their official duties could not be continued as against their successors, even though the successors consented.

Although the Act of 1899 was replaced by Section 11 of the Judiciary Act of 1925 (43 Stat. 936, 941, 28 U. S. C. (1946 ed.) 780), which in turn was omitted from the revision of Title 28 in 1948 for the stated reason that the same ground is covered by Rules 25 and 81 of the Federal Rules of Civil Procedure (H. Rep. No. 308, 80th Cong., 1st sess., A 239), there is nothing in the subsequent history of the provision to indicate that the purpose of the provision was ever converted from being "purely remedial, designed to remove what this court in the *Butterworth* case called an 'inconvenience'." (*Fix* v. *Philadelphia Barge Co.*, 290 U. S. 530, 533). To construe Rule 25(d) as applying to the instant cases, which historically would not abate even if no substitution were made, would not only violate the mandate of Rule 1, that the rules "shall be construed to secure the just, speedy and inexpensive determination of every action",[18] but would also hamper "the Govern-

[18] Although, in the instant cases, the United States may be barred from reinstituting these cases because of the one-year statute of limitations applicable to treble damage actions (Section 205(e) of the Emergency Price Control Act), the application of the ruling here sought by respondent would cause serious inconvenience to private litigants in similar situations arising in related fields (cf. *Seven Oaks* v. *Federal Housing Administration*, 171 F. 2d 947 (C. A. 4)).

ment in its efforts, through its proper officers, to enforce its laws or to obtain judgment for money rightfully due it or for statutory damages. The Rule was never intended to relieve defendants, in actions brought on behalf of the Government, of their statutory liability to the Government." *Fleming* v. *Goodwin, supra,* at 337-338.[19]

---

[19] *Fix* v. *Philadelphia Barge Co.*, 290 U. S. 530, and *Defense Supplies Corp.* v. *Lawrence Warehouse Co.*, 336 U. S. 631, relied on by the Seventh Circuit in the *Wilke* case (175 F. 2d 35 at 38-39), are distinguishable. The *Lawrence Warehouse* case is based on the special statute relating to the dissolution of the Defense Supplies Corporation. See 336 U. S. at 635-636, fn. 6. The *Philadelphia Barge* case, on the other hand, involved a situation where a new suit had been brought in the name of a successor Collector of Internal Revenue on a bond executed to a named Collector "or his successors", after an earlier suit had been held by a district court to be abated for failure to comply with 28 U. S. C. 780, the statutory predecessor of Rule 25(d). The question before this Court related not to the survival of a specific pending action but rather to the survival of the *cause* of action itself. This Court, in deciding that the cause of action had not abated, had no occasion to, nor did it, pass upon the propriety of the district court's holding that the earlier action had abated. Indeed, in discussing the impact of the Act of 1899, the Court, as quoted above in the text, specifically recognized its remedial purpose. See *supra*, p. 43.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below is erroneous and should be reversed. In the alternative, if it is held that the United States is not the proper plaintiff in these cases, we request this Court to remand the cases with leave to the Government to substitute the Secretary of Commerce as plaintiff.

PHILIP B. PERLMAN,
Solicitor General.
NEWELL A. CLAPP,
Acting Assistant Attorney General.
ROBERT W. GINNANE,
Special Assistant to the Attorney General.
PAUL A. SWEENEY,
MELVIN RICHTER,
Attorneys.

FEBRUARY 1951.

APPENDIX A

1. Executive Order No. 9841 (12 Fed. Reg. 2645) provides:

TERMINATION OF THE OFFICE OF TEMPORARY CONTROLS

WHEREAS the Congress, in the Urgent Deficiency Appropriation Act, 1947, approved March 22, 1947, has declared its intent that the Office of Temporary Controls be closed and liquidated by June 30, 1947; and

WHEREAS it is necessary to provide for the orderly liquidation of such Office and the disposition of its residual affairs:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and Statutes, including the last paragraph of Title I of the First Supplemental Surplus Appropriation Rescission Act, 1946, approved February 18, 1946, Title III of the Second War Powers Act, 1942 as amended by the First Decontrol Act of 1947, section 201 (b) of the Emergency Price Control Act of 1942, as amended, section 2 of the Stabilization Act of 1942, as amended, and Title I of the First War Powers Act, 1941, and as President of the United States, it is hereby ordered, in the interest of the internal management of the Government, as follows:

PART I

101. The Office of Temporary Controls, established by Executive Order No. 9809 of December 12, 1946, shall be terminated and

disposition shall be made of its functions according to the provisions of this order.

PART II

201. The provisions of this Part shall become effective on May 4, 1947.

202. Functions of the Temporary Controls Administrator under the Emergency Price Control Act of 1942, as amended, Executive Order No. 9809, and any other statute, order, or delegation are transferred as follows:

(a) Functions with respect to rent control are transferred to the Housing Expediter and shall be performed by him or, subject to his direction and control, by such officers or agencies of the Government as he may designate.

(b) Functions with respect to price control over rice are transferred to the Secretary of Agriculture and shall be performed by him or, subject to his direction and control, by such officers or agencies of the Department of Agriculture as he may designate.

(c) Functions with respect to (1) subsidies, including determinations of the correct amounts of claims and the recovery of overpayments (but excluding premium-payment functions transferred under paragraph 302 (b) hereof); (2) applications for price adjustments filed under Supplementary Order 9 and Procedural Regulation 6 (Adjustment of Maximum Prices for Commodities and Services under Government Contracts or Subcontracts, 7 F. R. 5087, 5444) of the Office of Price Administration; and (3) the interpre-

tation and application of price and subsidy regulations and orders which affect the amount of subsidy payable; are transferred to the Reconstruction Finance Corporation.

203. The following functions of the Temporary Controls Administrator are transferred to the Secretary of Commerce and shall be performed by him or, subject to his direction and control, by such officers and agencies of the Department of Commerce as he may designate:

(a) Functions of the President under Title III of the Second War Powers Act, 1942, as amended, vested in the Temporary Controls Administrator immediately prior to the taking of effect of this Part.

(b) Functions with respect to determining, under section 6 (a) of the Strategic and Critical Materials Stockpiling Act, the amount of strategic and critical materials necessary to make up any deficiency of the supply thereof for the current requirements of industry.

(c) Functions under section 124 of the Internal Revenue Code, as amended.

(d) Functions under section 12 of the act of June 11, 1942 (the Small Business Mobilization Act).

(e) Functions with respect to claims relating to the expansion of the capacity of defense plants when such expansion is alleged to have been undertaken at the request of the War Production Board or any of its predecessor agencies.

(f) Functions with respect to claims relating to property requisitioned by the Chairman of the War Production Board or by any of his predecessors.

(g) Except as otherwise provided by statute or this or any other Executive order, all other functions of the Temporary Controls Administrator which were immediately prior to the taking of effect of Executive Order No. 9809 vested in the Civilian Production Administrator.

204. Executive Order No. 9705 of March 15, 1946 (as modified by Executive Orders Nos. 9762 and 9809) is revoked.

205. Any authority vested in the Temporary Controls Administrator in pursuance of section 120 of the National Defense Act of 1916 (with respect to placing compulsory orders for products or materials) is withdrawn and terminated.

PART III

301. The provisions of this Part shall become effective June 1, 1947.

302. All functions vested in the Temporary Controls Administrator by Executive Order No. 9809 not otherwise disposed of by statute or by this or any other Executive order are transferred to the Secretary of Commerce and shall be performed by him or, subject to his direction and control, by such officers or agencies of the Department of Commerce as the Secretary may designate. Such functions shall include, but not be limited to, the following:

(a) Functions of the President under the Stabilization Act of 1942, as amended, vested in the Temporary Controls Administrator immediately prior to the taking of effect of this Part.

(b) Functions with respect to premium payments under section 2 (e) (a) (2) of the Emergency Price Control Act of 1942, as amended, insofar as such payments relate to copper, lead, and zinc ores.

(c) Functions with respect to the establishment of maximum prices for industrial alcohol sold to the Government or its agencies.

(d) The liquidation of the functions of the Office of Temporary Controls and of the agencies thereof, except liquidation relating to functions specifically transferred to other agencies (by the provisions of this order or otherwise).

303. The Office of Temporary Controls is terminated.

PART IV

401. The provisions of this Part shall become effective, respectively, on the dates on which functions are transferred or otherwise vested by the provisions of this order.

402. Functions under the Emergency Price Control Act of 1942, as amended, transferred under the provisions of this order shall be deemed to include authority on the part of each officer to whom such functions are transferred hereunder to institute, maintain, or defend in his own name civil proceedings in

any court (including the Emergency Court of Appeals), relating to the matters transferred to him, including any such proceedings pending on the effective date of the transfer of any such function under this order. The provisions of this paragraph shall be subject to the provisions of the Executive order entitled "Conduct of Certain Litigation Arising under Wartime Legislation," issued on the date of this order and effective June 1, 1947.[20]

403. (a) The records, property, and personnel relating primarily to the respective functions transferred under the provisions of this order shall be transferred, and the funds relating primarily to such respective functions shall be transferred or otherwise made available, to the agencies to which such functions are transferred. Such measures and dispositions as may be determined by the Director of the Bureau of the Budget to be necessary to effectuate the purposes and provisions of this paragraph shall be carried out in such manner as the Director may determine and by such agencies as he may designate.

(b) In order that the confidential status of any records affected by this order shall be fully protected and maintained, the use of any confidential records transferred hereunder shall be so restricted by the respective agencies as to prevent the disclosure of information concerning individual persons or firms to persons who are not engaged in functions or activities to which such records are directly

[20] See E. O. 9842, *infra*.

related, except as provided for by law or as required in the final disposition thereof pursuant to law.

404. All provisions of prior Executive orders in conflict with this order are amended accordingly. All other prior and currently effective orders, rules, regulations, directives, and other similar instruments relating to any function transferred by the provisions of this order or issued by any agency terminated hereunder or by any predecessor or constituent agency thereof, shall remain in effect except as they are inconsistent herewith or are hereafter amended or revoked under proper authority.

405. As used in this order, "functions" includes powers, duties, authorities, discretions, and responsibilities.

HARRY S. TRUMAN

THE WHITE HOUSE,
April 23, 1947.

2. Executive Order No. 9842 (12 Fed. Reg. 2646) provides:

CONDUCT OF CERTAIN LITIGATION ARISING UNDER WARTIME LEGISLATION

By virtue of the authority vested in me by the Constitution and statutes, including Title I of the First War Powers Act, 1941, and as President of the United States, and having regard to the established responsibilities and powers of the Department of Justice and of the Attorney General under

the statutes of the United States, it is hereby ordered, in the interest of the internal management of the Government, as follows:

1. The Attorney General is authorized and directed, in the name of the United States or otherwise as permitted by law, to coordinate, conduct, initiate, maintain or defend:

(a) Litigation before the Emergency Court of Appeals for and on behalf of the Secretary of Agriculture, the Secretary of Commerce, and the Reconstruction Finance Corporation, respectively;

(b) Litigation against violators of regulations, schedules or orders relating to maximum prices pertaining to any commodity which has been removed from price control;

(c) Litigation arising out of Directive 41, as amended, of the Office of Economic Stabilization pertaining to the withholding of subsidies because of noncompliance with or violations of control orders.

2. Nothing herein shall be deemed to restrict or limit the powers conferred upon the Attorney General by law with respect to the conduct, settlement, disposition or review of litigation.

3. The functions and duties of the Attorney General under this order shall be performed by him or, subject to his direction and control, by such officers or agencies of the Department of Justice as he may designate, and there shall be made available to the Attorney General, pursuant to the provisions of Executive Order No. 9784 of September 25, 1946,

any files or records pertinent to the subject matter hereof.

4. This order shall become effective June 1, 1947.

HARRY S. TRUMAN.

THE WHITE HOUSE,
April 23, 1947.

APPENDIX B

The letter of the Administrator, Office of Temporary Controls to the Attorney General, dated April 30, 1947, reads as follows:

OFFICE OF TEMPORARY CONTROLS

Washington, D. C., April 30, 1947.

MY DEAR MR. ATTORNEY GENERAL:

Now that the President has signed the two Executive Orders issued in connection with the prospective dissolution of the Office of Temporary Controls, it may be useful for me to advise you of my understanding of the arrangements desired by you with reference to the termination of the Office of Price Administration. My understanding is as follows:

1. The Department of Justice will undertake the task of completing the O. P. A. litigation program, so far as decontrolled commodities are concerned, such litigation to be conducted in the name of the United States of America.

2. The Department of Justice will undertake the task of conducting all litigation in

the Emergency Court of Appeals, except on behalf of the Housing Expediter who will conduct his own litigation in that court;

3. The Department of Justice will not take on any O. P. A. attorneys or other personnel now connected with the above functions;

4. The assumption by the Department of Justice of the above responsibilities, including the case records relating thereto, will become effective June 1, 1947, and after that date the Department of Justice will have sole responsibility for this litigation;

5. The O. P. A. personnel now engaged in work on the programs set out above will be given termination notices to be effective not later than May 31, 1947, except as certain of such personnel are needed by the Department of Commerce for other activities.

It may perhaps be well for me to call your attention to one difficulty that we must both face in connection with the foregoing. As you will realize, the present O. P. A. legal and enforcement staff is designed to handle the current sizeable workload of active litigation. Although some work has also been done on the preparation of case records for use by the Department of Justice, progress has been necessarily slow because of personnel limitations and in no event will it be possible to complete the indexed transmittals even for all the more important cases prior to June 1. Nevertheless, we will continue to put forth our best efforts on this so as to lighten your task after that date.

I should greatly appreciate an expression from you of your concurrence in the understanding outlined above and in closing I can assure you that you can count on our full cooperation in effectuating the transfer.

Sincerely yours,

(S.) PHILIP B. FLEMING,
Major General, U. S. A.,
Administrator.

The Honorable
The ATTORNEY GENERAL OF THE UNITED STATES.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 929270 544

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U. S.
FILED
NOV 22 1950
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 364

UNITED STATES OF AMERICA,
Petitioner,

v.

ALLIED OIL CORPORATION, P. & M. LIQUOR CORP., *et al.*,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THOMAS J. DOWNS,
HERBERT M. JOHNSON,
JULIUS L. SHERWIN,
THEODORE R. SHERWIN,
HARRY FREEMAN,
KERNAL FREEMAN,
MICHAEL F. MULCAHY,
HENRY W. DIERINGER,
MILTON T. RAYNOR,
185 South La Salle Street,
Chicago 3, Illinois,
Attorneys for Respondents.

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

PAGE

Opinion of Court of Appeals and Jurisdiction 1

Questions Presented 2

Statement of Facts 2

Argument 3

Conclusion 15

CITATIONS

Cases:

Barnsdall v. Waltemeyer, 142 F. 415 14

Bowles v. Wilke, 175 F. (2d) 35, cert. denied, 338 U. S. 861 ..... 7, 8, 11, 12

Bruce's Juices, Inc. v. American Can Co., 330 U. S. 743 (1947) 6, 9

Buck Stove Co. v. Vickers, 226 U. S. 205 14

Collett, Ex parte, 337 U. S. 55, 65-71 (May 13, 1949) 12

Collins v. Porter, 328 U. S. 46 13

Cunningham v. Rodgers, 171 F. 835 14

Fitzpatrick v. Flanagan, 106 U. S. 648 14

Fix v. Philadelphia Barge Co., 290 U. S. 530, 533 .. 12

Fleming v. Mohawk Wrecking & Lumber Company, 331 U. S. 111 13

Leitensdorfer v. Webb, 20 How. (61 U. S. 176 13

Marinette Sawmill Co. v. Scofield, 174 F. 562 14

McHie v. McHie, 78 F. (2d) 351, 353 ..... 12, 14

Piquignot v. Pennsylvania R. R. C., 16 How. (57 U. S.) 104 14

Roche v. Evaporated Milk Association, 319 U. S. 21 14

Stephens v. Monongahela Bank, 111 U. S. 197 13

United States v. Hark, 320 U. S. 531 13

Utah Junk Company v. Porter, 328 U. S. 39 13

D. R. Wilder Mfg. Co. v. Corn Products Refining Co., 236 U. S. 165 (1915) 6

PAGE

Federal Statutes:

1 Stat. 84 ..... 13, 14
25 U.S.C.A. Sec. 201 10
28 U.S.C.A. Sec. 2105 ..... 2, 3, 12, 13, 14
31 U.S.C.A. Sec. 232 10
40 U.S.C.A. Sec. 270b 10
Sec. 205, Emergency Price Control Act, as amended, (50 App. U.S.C.A. Sec. 925) 3, 6, 9, 10

Miscellaneous:

Executive Order 9841 (12 Fed. Reg. 2645) 3, 4
Executive Order 9842 (12 Fed. Reg. 2646) 3, 4, 5
Rule 25(d) Federal Rules of Civil Procedure 2, 11, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 364

UNITED STATES OF AMERICA,
Petitioner,

v.

ALLIED OIL CORPORATION, P. & M. LIQUOR CORP., *et al.*,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

1. STATEMENTS MADE PURSUANT TO RULE 27.

A. The opinion of the Court of Appeals (R. 128-132) is reported in 183 F. (2d) 453.

B. The judgments of the Court of Appeals were entered on July 19, 1950 (R. 132-135). The mandates of the Court of Appeals were issued to the District Court on August 28, 1950 (R. 141-142).

C. Petitioner states that the jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

2. QUESTIONS PRESENTED.

A. May the United States be substituted as party plaintiffs in these actions?

B. Were the orders granting defendants' motions to abate, and dismissing the actions appealable under Section 2105 of the revised Judicial Code (28 U. S. C. Sec. 2105) which provides:

> "There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction."

STATEMENT OF FACTS.

Petitioner's statement of facts is substantially correct with the exception that the action of the District Court in dismissing the cause was founded upon the ground that there had been a failure to comply with Rule 25(d) of the Federal Rules of Civil Procedure in that the Secretary of Commerce, the successor to Philip E. Fleming, Temporary Controls Administrator, had failed within six months after becoming Fleming's successor to show satisfactory to the court that there is a substantial need for continuing and maintaining these actions and to move to be substituted as plaintiffs. (R. 19-20)

ARGUMENT.

Two Federal statutes, each crystal clear in its language and inescapable in its application to this case, stand squarely in the path of Petitioner's argument. The first is 28 U. S. C. §2105, which precludes "reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction." The second is Section 205(e) of the Emergency Price Control Act, as amended, which provides that actions such as these shall be instituted by the Price Control Administrator.

The Petitioner asks this Court to ignore the plain statutory commands and to enter a decision which can only have the effect of rewriting the statutes.

I.

Executive Orders 9841 and 9842 do not authorize the maintenance of these suits by the United States.

The Petitioner seeks to find in Executive Orders 9841 and 9842 a direction that the suits at bar be maintained in the name of the United States. What this argument overlooks is that the President of the United States is just as powerless to rewrite acts of Congress as are the courts. The President could not by executive order authorize the United States to maintain this litigation in the face of the Emergency Price Control Act which confines that responsibility to the Administrator. However, it is apparent that the Executive Orders in question were not intended to reach beyond presidential authority. By their terms they do not support Petitioner's position.

Executive Order 9841, promulgated on April 23, 1947 (12 Fed. Reg. 2645), expressly provides, in Section 302 thereof, that effective June 1, 1947 all price control functions theretofore vested in the Temporary Controls Administrator, with certain exceptions not relevant here, are "transferred to the Secretary of Commerce and shall be performed by him or, subject to his direction and control, by such officers or agencies of the Department of Commerce as the Secretary may designate • • •"

Section 402 of the above Executive Order states that the transfer of functions shall include "authority on the part of each officer to whom such functions are transferred hereunder to institute, *maintain or defend in his own name civil proceedings in any court* (including the Emergency Court of Appeals), relating to the matters transferred to him, *including any such proceedings pending on the effective date of the transfer of any such function under this order.*" (Emphasis supplied) The provisions of this paragraph are expressly made subject to Executive Order 9842.

Executive Order 9842 (12 Fed. Reg. 2646), promulgated by the President on the same date as the foregoing Executive Order 9841, states that the Attorney General is authorized and directed to conduct and maintain price control enforcement litigation "in the name of the United States or *otherwise as permitted by law.*" (Emphasis supplied)

It is clear from these Executive Orders that as of June 1, 1947, the Secretary of Commerce became the successor to the Price Control Administrator, with full authority to maintain pending litigation in his own name. The Attorney General is authorized to represent the Secretary of Commerce in such litigation. The litigation conducted by the Attorney General may be in the name of the United States *or otherwise as permitted by law.* In the actions

now before this Court, the litigation must be conducted in the name of the Price Administrator or his successor, as that is the only procedure *permitted by law*—the Emergency Price Control Act. Thus, Executive Order 9842 does not even purport to authorize the maintenance of this litigation in the name of the United States, and if it did it would, of course, be nugatory as constituting executive action in violation of statute. The Attorney General was to act as the Attorney for the Secretary of Commerce. The fact that someone in the Department of Justice may be embarrassed by the holding of the Court of Appeals in this case is no justifiable reason why the Petitioner should not have followed the rules of procedure which should be binding on both Petitioner and Respondents. We submit that the President properly acted in accordance with his statutory authority.

No construction, administrative or otherwise, can be permitted to prevail over the plain language of the Emergency Price Control Act, which requires that these actions be maintained by the Price Administrator. We are dealing in this case with an action which is created wholly by statute. Were it not for the statute no action would lie. It is therefore elementary that Petitioner instead of trying to avoid substitution of proper plaintiff, should have substituted the Secretary of Commerce as the President in his Executive Orders directed.

II.

The Emergency Price Control Act, as amended, requires that these actions be maintained by the Price Control Administrator. The United States cannot be substituted as party plaintiff.

Section 205(e) of the Emergency Price Control Act, as amended (50 App. U.S.C.A. §925(e)) creates the liability which is sought to be enforced in these proceedings. It must be conceded that, absent this statute, there would be no basis for the institution or maintenance of these suits. Under such circumstances, it is well settled that the provisions of this statute must be meticulously observed with respect to the extent of the liability and the mode of its enforcement. In *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 174 (1915), this Court stated the rule as follows:

> "• • • 'where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes.' "

This language was recently quoted with approval and the rule reaffirmed in *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743, 755 (1947).

Turning to Section 205(e) of the Emergency Price Control Act, as amended, we find that after establishing the liability of a seller to respond in a *civil* action for damages arising out of overcharges, the section provides that if the buyer fails to commence a suit "*the Administrator may institute such action on behalf of the United States.* • • • If such action is instituted *by the Administrator,* the buyer shall thereafter be barred. • • • Any action under this subsection by *either the buyer or the Administrator,* as the case may be, may be brought in any court of competent jurisdiction." (Emphasis supplied.)

The statute thus prescribes in plain and unambiguous language that the plaintiff in these actions shall be either the buyer or the Administrator. The United States, in seeking to be substituted as party plaintiff, asks this Court to override this statutory requirement.

If it was the intention of the Congress that the United States should be party plaintiff and that the Administrator under the Emergency Price Control Act is only a "figurehead", why were not all original civil proceedings involving that Act started in the name of Petitioner? It is obvious that the Department of Justice in notifying the various United States Attorneys throughout the country was guilty of not giving proper instructions as to the substitution. Petitioner now seeks to rectify the mistakes by changing the rules "in the middle of the game". It seems to the Respondents that the same rules should apply to the Government as to the ordinary citizen.

Nowhere in Petitioner's Brief is there indicated why Fleming, as Administrator of the Office of Temporary Controls, was substituted as the then Successor Administrator to Porter instead of the United States.

The Petitioner contends that it may be granted leave to maintain these actions on the theory that it is the real party in interest. This identical argument was advanced by the Government and was firmly rejected in *Bowles* v. *Wilke*, 175 F. (2d) 35 (1949) *cert. denied* 338 U. S. 861. As the Court there said, this argument begs the question in view of the language of the Emergency Price Control Act. The court stated:

> "The Government seeks to avoid the rule by insisting that it applies only to cases involving personal actions against governmental officers, and not to actions brought by such officers for the ultimate benefit of the United States; that the United States was al-

ways the 'real party in interest,' and, consequently, no substitution was required. But, in the *Fix* case, it could as truly have been said that the United States was the 'real party in interest,' in that any recovery on the bond would have inured to the benefit of the United States and not to the Collector personally. The same is true of most actions brought by an agent or arm of the United States Government. In other words, to argue that the Administrator was only a nominal plaintiff; that the United States was the real party in interest, and hence that there was no need for the Administrator's successors to comply with the rule, is to beg the question. *The fact remains that the Emergency Price Control Act provided that such actions were to be instituted and maintained by the Administrator, and the plain language of the rule calls for its application to those cases.*" (Emphasis supplied.)

Petitioner purports to cite various cases in which it indicates a conflict with the decision of the Court of Appeals in the instant action. Petitioner nowhere in its Brief cites the case of *Bowles* v. *Wilke*, 175 F. (2d) 35 which is the latest pronouncement on the question herein involved prior to the decision in the instant case. In the *Wilke* case, certiorari was denied by this Court on October 24, 1949 (338 U. S. 861). It is subsequent to the cases cited from the other circuits and it is obvious that the Court took into consideration the prior holdings. The holdings on the questions involved in this case in the so-called "conflicting" circuits were to a large extent merely incidental to the questions involved here.

The argument that the Price Administrator is simply a nominal plaintiff and that the United States is the real party in interest not only does violence to the statutory prescription of the party plaintiff in these actions, but also misconceives the interests involved. The provision

for treble damage actions was included in the Price Control Act as one of the principal price control enforcement weapons. Accordingly, the Administrator was given control over these actions so that they could be used in the exercise of his sound administrative discretion to effectuate the purposes of the Act. Similarly, Section 205(a) permits the Administrator to seek injunctions, Section 205(d) authorizes him to intervene in any suit wherein a party relies upon the Act or any requirement thereunder, and Section 205(f) authorizes him to institute a licensing system (50 App. U.S.C.A. §925(a), (d), (f)). The role of the United States is confined to the bringing of *criminal* prosecutions under Section 205(b). Even in connection with criminal prosecutions, however, Section 205(b) provides that whenever the Administrator has reason to believe that any person is liable to prosecution, he may certify the facts to the Attorney General.

Thus it is apparent that the statutory enforcement scheme is complete, integrated and specific and shows a conscious and deliberate delineation by Congress between the respective responsibilities and powers of the Administrator and the United States. In a situation such as this, where Congress has defined in a comprehensive manner the enforcement devices which it intended to permit, it is not for the judiciary or the executive to add new sanctions or to interpolate modifications. *Cf. Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. at 750-1 (1947).

It is no answer to say that at the present time the need for administrative discretion in enforcement of price control no longer exists. The fact remains that this was the reason which prompted Congress to draft the statute so that these actions could be instituted and maintained only by the Administrator. The statute cannot now be rewrit-

ten by the courts or by an executive order but must be left to Congress to change, if any changes in its clear language and meaning are to be made.

It is true that Section 205(e) provides that the Administrator shall sue "on behalf of the United States". The purpose of this requirement, however, was to make certain that the sums recovered would go into the United States treasury and would not be used by the Administrator to augment the funds appropriated to him by Congress. Congress was simply protecting its supervision over administrative action through its control over the purse strings; it was not declaring that the Administrator was an automaton with only a nominal interest in enforcement litigation. Indeed, the fact that Congress specifically provided that the Administrator shall bring these actions on behalf of the United States indicates that Congress was attentive to the very problem here under consideration and that it said exactly what it intended. Where Congress has desired to authorize the bringing of suits in the name of the United States, it has used explicit language, appropriate to its purpose. See *e. g.*, 25 U.S.C.A. §201; 31 U.S.C.A. §232; 40 U.S.C.A. §270b.

Cases in which the United States is permitted to sue upon a cause of action which could also have been enforced by a governmental agency are plainly distinguishable. In none of those cases does the governing statute limit the right to sue to a particular government official as does the Emergency Price Control Act.

III.

The order of dismissal is not appealable as Section 2105 of the Judicial Code prohibits reversal "for error in ruling upon matters in abatement".

With respect to the appealability of the orders entered by the District Court, we believe that they are clearly not subject to review under 28 U.S.C.A. §2105, as correctly applied in *Bowles* v. *Wilke,* 175 F. (2d) 35 (1949) *cert. denied* 338 U. S. 861. That decision squarely settles this point.

In the *Wilke* case at Page 38 the court said that it is clear

> "if the decision of the District Court in the case at bar was based on a matter in abatement not involving jurisdiction, the statute forbids a reversal by this court, irrespective of the correctness of the ruling."

In referring to the holding of the District Court the court said further

> "in holding that the action had abated, the court had to determine first that the provisions of Rule 25(d) applied to Bowles successor. If the court erred in its conclusion, it committed an error in ruling upon a matter of abatement which we are precluded by statute from reviewing."

The District Judge in the cases at bar likewise determined that the provisions of Rule 25(d) of the Rules of Civil Procedure applied and found as a part of his order (R. 20) that the Secretary of Commerce as the successor in office to the Temporary Controls Administrator had failed within six months after taking office to show satisfactorily to the court that there was a need for continuing and maintaining these actions and to move to be substituted in these actions.

Petitioner does not challenge the holding of the court in *Bowles* v. *Wilke,* 175 F. (2d) 35 (1949) cert. denied 338 U. S. 861, that the granting of defendants' motions to dismiss or abate was a "ruling upon matters in abatement." Section 2105 on its face would preclude reversal.

The reenactment of this provision as a part of the revised Judicial Code indicates a Congressional intent that it should continue as one of the important boundary posts delineating the field of federal appellate court functions. Especially is this true in the light of the excellence of the advisory work on this revision, so well described in *Ex parte Collett,* 337 U. S. 55, 65-71 (May 13, 1949). From the standpoint of this case, the significant changes in the provision are, *first,* a broadening of the reversal prohibition to cover the more general "matters in abatement" in lieu of "pleas in abatement," and *second,* the insertion of the word "upon" after "ruling" apparently because of the criticism of this omission in *McHie* v. *McHie,* 78 F. (2d) 351.

In the *Wilke* case the court cited with approval *Fix* v. *Philadelphia Barge Co.,* 290 U. S. 530, 533, that failure of a successor collector of internal revenue to make timely application for substitution "forecloses the particular remedy * * *; it does not destroy the right." Thus, it is apparent that any possible "harshness" in applying Section 2105 arises from a purely collateral matter, *i. e.,* the one year statute of limitations. This Congressional limitation upon the period of possible liability should not be circumvented by asking that Section 2105 and Rule 25(d) be interpreted contrary to their clear language and the previous decisions of the Supreme Court. Such statutes and rules are designed to apply independently of collateral matters, such as the possibility that there may be a valid defense to a subsequent action.

In *Fleming* v. *Mohawk Wrecking & Lumber Company,* 331 U. S. 111 this Court indicated that Rule 25(d) is applicable to an action such as this. In that case this Court said (331 U. S. at page 119, 67 S. Ct. at Page 1133):

> "For these reasons Fleming is a successor in office of Porter and may be substituted as a party under Rule 25, Rules of Civil Procedure, 28 U.S.C.A. following section 723c. The rule requires a showing of 'substantial need' for continuing and maintaining the action. Though most of the controls have been lifted, the Act is still in effect. Liabilities incurred prior to the lifting of controls are not thereby washed out. *United States* v. *Hark,* 320 U. S. 531, 536, 64 S. Ct. 359, 362; *Utah Junk Co.* v. *Porter,* 328 U. S. 39, 44, 66 S. Ct. 889, 892; *Collins* v. *Porter,* 328 U. S. 46, 49, 66 S. Ct. 893, 894."

It is clear that where a final judgment has been entered, an appeal may be taken and the reviewing court may consider any prejudicial errors which may have contributed to that judgment, provided they are not errors in "ruling upon matters in abatement." Obviously, there might be other errors. *Leitensdorfer* v. *Webb,* 20 How. (61 U. S.) 176, illustrates the distinction. There a plea in abatement on the ground that the attachment affidavit was insufficient was overruled and, after a trial on the merits, plaintiff obtained judgment. On writ of error, the Supreme Court held that section 22 of the Judiciary Act of 1789 (1 Stat. 84), from which Section 2105 is derived, prohibited reversal because of the ruling on the plea in abatement and, since the defendant failed to show error in the trial on the merits, the Supreme Court affirmed the judgment.

Wherever the provision against reversal for error in abatement rulings has been invoked, the Supreme Court has applied it. In *Stephens* v. *Monongahela Bank,* 111 U. S. 197, the Supreme Court affirmed a judgment on a ruling

in abatement on the basis of the statute, saying at page 198:

> "* * * it is expressly provided that there shall be no reversal in this court or the Circuit Court for error in ruling any plea in abatement * * *. The defence is one which merely defeats the present proceeding, and does not conclude the plaintiff forever, * * *."

In *Piquignot* v. *Pennsylvania R. R. Co.*, 16 How. (57 U. S.) 104, the defendant pleaded in abatement that another suit was pending in the state court. The trial court overruled the plaintiff's demurrer to the plea and entered judgment for the defendant, which was affirmed by the Supreme Court, which said on page 104:

> "The judgment of the court below on the plea is not subject to our revision on a writ of error."

To the same effect are *McHie* v. *McHie*, 78 F. (2d) 351, *Marinette Sawmill Co.* v. *Scofield*, 174 F. 562, *Barnsdall* v. *Waltemeyer*, 142 F. 415, and *Cunningham* v. *Rodgers*, 171 F. 835.

Fitzpatrick v. *Flanagan*, 106 U. S. 648, like several other cases, was decided without reference to the statutory predecessor of Section 2105. *Buck Stove Co.* v. *Vickers*, 226 U. S. 205 and *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, were both decided on the basis of express limitations in the language of Section 22 of the First Judiciary Act which restricted its application to a review of decisions in the federal courts and to civil cases. Neither of these decisions throw the slightest doubt on the application of Section 2105 to a civil case decided by a federal district court, as in the case at bar.

CONCLUSION.

It is the position of Respondents that there are no special circumstances in this case which furnish a reason for reviewing a judgment of the character which was entered and, further, that the decision of the Court of Appeals is clearly correct. It is submitted that the petition of certiorari should be denied.

Respectfully submitted,

THOMAS J. DOWNS,
HERBERT M. JOHNSON,
JULIUS L. SHERWIN,
THEODORE R. SHERWIN,
HARRY FREEMAN,
KERNAL FREEMAN,
MICHAEL F. MULCAHY,
HENRY W. DIERINGER,
MILTON T. RAYNOR,
135 South La Salle Street,
Chicago 3, Illinois,
Attorneys for Respondents.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
FEB 26 1951

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 364

UNITED STATES OF AMERICA,
Petitioner,

v.

ALLIED OIL CORPORATION, P. & M. LIQUOR CORP., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENTS.

THOMAS J. DOWNS,
HERBERT M. JOHNSON,
JULIUS L. SHERWIN,
THEODORE R. SHERWIN,
HARRY FREEMAN,
KERNAL FREEMAN,
MICHAEL F. MULCAHY,
HENRY W. DIERINGER,
MILTON T. RAYNOR,
135 South La Salle Street,
Chicago 3, Illinois,
Attorneys for Respondents.

The Scheffer Press, Inc.—ANdover 3-6850

INDEX.

	PAGE
Opinion of Court of Appeals and Jurisdiction	1
Questions Presented	2
Summary of Argument	2
Argument	3
Conclusion	19

CITATIONS.

Cases:

Allied Oil Corp. v. Turney, 170 F. (2d) 79	6, 8
Barnsdall v. Waltemeyer, 142 F. 415	18
Bowles v. Wilke, 175 F. (2d) 35, cert. denied, 338 U. S. 861	11, 12, 13, 15, 16
Bruce's Juices, Inc. v. American Can Co., 330 U. S. 743 (1947)	9, 13
Buck Stove Co. v. Vickers, 226 U. S. 205	18
Collett, Ex parte, 337 U. S. 55, 65-71 (May 13, 1949)	16
Collins v. Porter, 328 U. S. 46	17
Cunningham v. Rodgers, 171 F. 835	18
Fitzpatrick v. Flanagan, 106 U. S. 648	18
Fix v. Philadelphia Barge Co., 290 U. S. 530, 533	16
Fleming v. Mohawk Wrecking & Lumber Company, 331 U. S. 111	17
Leitensdorfer v. Webb, 20 How. (61 U. S.) 176	17
Marinette Sawmill Co. v. Scofield, 174 F. 562	18
McHie v. McHie, 78 F. (2d) 351, 353	16, 18
Piquignot v. Pennsylvania R. R. Co., 16 How. (57 U. S.) 104	18
Porter v. Warner Holding Co., 328 U. S. 305 (401)	9
Roche v. Evaporated Milk Association, 319 U. S. 21	18

PAGE

Snyder v. Buck, 340 U. S. 15 10
Stephens v. Monongahela Bank, 111 U. S. 197 18
United States v. Hark, 320 U. S. 531 17
Utah Junk Company v. Porter, 328 U. S. 39 17
D. R. Wilder Mfg. Co. v. Corn Products Refining Co., 236 U. S. 165 (1915) 8

Federal Statutes:

1 Stat. 84 .....18, 19
25 U. S. C. A. Sec. 201 15
28 U. S. C. A. Sec. 2105 .....2, 16, 17, 18
31 U. S. C. A. Sec. 232 15
40 U. S. C. A. Sec. 270b 15
50 U. S. C. A. Sec. 901 2
Sec. 205, Emergency Price Control Act, as amended, (50 App. U. S. C. A. Sec. 925) .....
.....2, 8, 9, 12, 14

Miscellaneous:

Executive Order 9841 (12 Fed. Reg. 2645) 2, 3, 4, 7
Executive Order 9842 (12 Fed. Reg. 2646) 2, 3, 4, 5
Rule 25(d) Federal Rules of Civil Procedure 16, 17

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 364

UNITED STATES OF AMERICA, PETITIONER

v.

ALLIED OIL CORPORATION, P. & M. LIQUOR CORP., ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE RESPONDENTS.

Opinion Below.

The opinion of the United States Court of Appeals for the Seventh Circuit (R. 127-132) is reported at 183 F. 2d 453. The United States District Court for the Northern District of Illinois entered no written opinion.

Jurisdiction.

The judgments of the Court of Appeals were entered on July 19, 1950 (R. 132-135). The petition for a writ of certiorari was filed on October 16, 1950, and granted on December 4, 1950 (R. 143). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

Questions Presented.

Whether pending suits for the recovery of damages for sales at prices in excess of those established by applicable regulations under the Emergency Price Control Act of 1942, as amended (50 U. S. C. App. 901, *et seq.*), may be maintained by the United States in its own name, or must be maintained in the name of the Secretary of Commerce.

Summary of Argument.

Two Federal statutes, each crystal clear in its language and inescapable in its application to this case, stand squarely in the path of Petitioner's argument. The first is Section 205 (e) of the Emergency Price Control Act, as amended, which provides that actions such as these shall be instituted by the Price Control Administrator. The second is 28 U. S. C. §2105 which precludes "reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction." These statutes taken into consideration with Executive Orders 9841 and 9842 completely answers Petitioner's plea that the United States instead of the Secretary of Commerce should have been substituted as defendant in the present cases. Petitioner would have this Court ignore not only the statutes but the direction by the President that the Secretary of Commerce maintain and defend "in his own name *civil* proceedings in any court" and "including any such proceedings *pending*".

The Petitioner asks this Court to ignore the plain statutory commands and to enter a decision which can only have the effect of rewriting the statutes.

ARGUMENT.

I.

Executive Orders 9841 and 9842 do not authorize the maintenance of these suits by the United States.

The Petitioner seeks to find in Executive Orders 9841 and 9842 a direction that the suits at bar be maintained in the name of the United States. What this argument overlooks is that the President of the United States is just as powerless to rewrite acts of Congress as are the courts. The President could not by executive order authorize the United States to maintain this litigation in the face of the Emergency Price Control Act which confines that responsibility to the Administrator. However, it is apparent that the Executive Orders in question were not intended to reach beyond presidential authority. By their terms they do not support Petitioner's position.

Executive Order 9841, promulgated on April 23, 1947 (12 Fed. Reg. 2645), expressly provides, in Section 302 thereof, that effective June 1, 1947 all price control functions theretofore vested in the Temporary Controls Administrator, with certain exceptions not relevant here, are "transferred to the Secretary of Commerce and shall be performed by him or, subject to his direction and control, by such officers or agencies of the Department of Commerce as the Secretary may designate * * *"

Section 402 of the above Executive Order states that the transfer of functions shall include "authority on the part of each officer to whom such functions are transferred hereunder to institute, *maintain or defend in his*

own name civil proceedings in any court (including the Emergency Court of Appeals), relating to the matters transferred to him, *including any such proceedings pending on the effective date of the transfer of any such function under this order.*" (Emphasis supplied) The provisions of this paragraph are expressly made subject to Executive Order 9842.

Executive Order 9842 (12 Fed. Reg. 2646), promulgated by the President on the same date as the foregoing Executive Order 9841, states that the Attorney General is authorized and directed to conduct and maintain price control enforcement litigation "in the name of the United States or *otherwise as permitted by law.*" (Emphasis supplied)

It is clear from these Executive Orders that as of June 1, 1947, the Secretary of Commerce became the successor to the Price Control Administrator, with full authority to maintain *pending civil* litigation in his own name. The Attorney General is authorized to represent the Secretary of Commerce in such litigation. In the actions now before this Court, the litigation must be conducted in the name of the Price Administrator or his successor, as that is the only procedure *permitted by law*—the Emergency Price Control Act. Thus, Executive Order 9842 does not even purport to authorize the maintenance of this litigation in the name of the United States, and if it did it would, of course, be nugatory as constituting executive action in violation of statute. The Attorney General was to act as the Attorney for the Secretary of Commerce. The fact that someone in the Department of Justice may be embarrassed by the holding of the Court of Appeals in this case is no justifiable reason why the Petitioner should not have followed the rules of procedure which should be binding on both Petitioner and Respondents.

We submit that the President properly acted in accordance with his statutory authority.

The Petitioner throughout its Brief seems to be arguing with itself about the power of the President to issue the Executive Orders in question. We raise no question as to the President's power to designate a Successor within the Emergency Price Control Act. He has done that. He has appointed the Secretary of Commerce. The Petitioner in its attempt to camouflage or otherwise cover up its mistake in not properly construing the Executive Orders attempts to read into the Orders something that is not there.

No construction, administrative or otherwise, can be permitted to prevail over the plain language of the Emergency Price Control Act, which requires that these actions be maintained by the Price Administrator. We are dealing in this case with an *action* which is *created wholly by statute.* Were it not for the statute no action would lie. It is therefore elementary that Petitioner instead of trying to avoid substitution of proper plaintiff, should have substituted the Secretary of Commerce as the President in his Executive Orders directed.

Petitioner seems to base its entire case upon that portion of Executive Order 9842 (Petitioner's Brief, page 53) providing as follows:

> "1. The Attorney General is authorized and directed, *in the name of the United States or otherwise as permitted by law*, to coordinate, conduct, initiate, maintain or defend:
>
> (a) Litigation before the Emergency Court of Appeals for and on behalf of the Secretary of Agriculture, the Secretary of Commerce, and the Reconstruction Finance Corporation, respectively;

> (b) Litigation against violators of regulations, schedules or orders relating to maximum prices pertaining to any commodity which has been removed from price control;"

Just a cursory examination of the above quoted portion of the Order would indicate that under (a) and (b) the same authority would apply as to the use of "the name of the United States or otherwise as permitted by law". The fact remains that since the effective dates of the Executive Orders in question, to wit, June 1, 1947, Petitioner as to litigation arising under (a) did not substitute "in the name of the United States" but on the contrary used the name of the Cabinet Secretary, such as Secretary of Commerce, or "such officers or agencies of the Department of Commerce as the Secretary may designate". To illustrate we should like to call to the Court's attention the case of *Allied Oil Corporation* v. *Edgar C. Turney, Director, Division of Liquidation, Department of Commerce,* 170 Fed. 2d 79, decided by the United States Emergency Court of Appeals on October 14, 1948. Turney was Respondent in that case. He was not represented by attorneys from the Department of Commerce. A number of attorneys are listed in the heading of the case, including the then Attorney General, and at the end of the paragraph listing the attorneys it is stated "all of the Department of Justice". If it were not the proper construction of the Executive Orders in the *Turney* case to have Turney as an official of the Department of Commerce be a party to said suit why did the Deartment of Justice not substitute as defendant "the name of the United States"?

There are numerous other instances of actions under the Emergency Price Control Act since the issuance of the Executive Orders in question in which the individual

official and not "the name of the United States" was used. If it was right in those cases to use the name of the individuals why is it not right now? This Court should not permit the Department of Justice to talk out of both sides of its mouth in construing these Executive Orders. That Department should not be permitted in the name of expediency to correct its mistake of having given improper instructions in the substitution of the OPA cases.

Under (b) above it seems to us almost elementary that what the President was referring to when the Order speaks of litigation against "violators" that the reference was to criminal violators. Violators infers and imputes that it is one who transgresses, injures, ill-uses, profanes or treats irreverently. It infers we believe the commission of a criminal act and does not in any sense refer to *civil* proceedings, as the *only* time *civil* proceedings or *pending* proceedings is mentioned is in Section 402 of Executive Order 9841. The strongest inference that could possibly be drawn from the language of these Executive Orders as far as the Attorney General is concerned is that he was to represent in his capacity as Attorney the Successor Administrator, the Secretary of Commerce.

Petitioner at Page 19 of its Brief cites several cases in its attempt to show to this Court that these suits originally or at any time could have been brought in the name of the United States. The cases there cited as authority have only to do with funds and moneys belonging to governmental agencies. We have no quarrel with that position as to funds belonging to governmental agencies whether it is the Housing Authority, the Bureau of Indian Affairs or the Office of Price Administration.

Those cases and that argument have nothing to do with the question presented to this Court.

At the bottom of Page 31 of Petitioner's Brief it is stated that if the Secretary of Commerce were the Successor Administrator "he would be charged with the furnishing of the staff to handle this litigation". This of course is a ridiculous statement inasmuch as the Orders in question provided that the Attorney General should represent the various Cabinet Officers, including the Secretary of Commerce, in carrying out his duty as Successor-Administrator under the Act. This is very forcibly answered, of course, by the Attorney General and his staff representing the Secretary of Commerce in the *Allied Oil Corporation* v. *Turney*, 170 Fed. (2d) 79, referred to above. The Attorney General had charge of the litigation as attorney and in no other capacity.

II.

The Emergency Price Control Act, as amended, requires that these actions be maintained by the Price Control Administrator. The United States cannot be substituted as party plaintiff.

Section 205 (e) of the Emergency Price Control Act, as amended (50 App. U.S.C.A. §925 (e)) creates the liability which is sought to be enforced in these proceedings. It must be conceded that, absent this statute, there would be no basis for the institution or maintenance of these suits. Under such circumstances, it is well settled that the provisions of this statute must be meticulously observed with respect to the extent of the liability and the mode of its enforcement. In *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 174 (1915), this Court stated the rule as follows:

> "• • • 'where a statute creates a new offense and denounces the penalty, or gives a new right and de-

clares the remedy, the punishment or the remedy can be only that which the statute prescribes.' ''

This language was recently quoted with approval and the rule reaffirmed in *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743, 755 (1947).

Turning to Section 205(e) of the Emergency Price Control Act, as amended, we find that after establishing the liability of a seller to respond in a *civil* action for damages arising out of overcharges, the section provides that if the buyer fails to commence a suit "*the Administrator may institute such action on behalf of the United States.* * * *. If such action is instituted by the Administrator,* the buyer shall thereafter be barred. * * * Any action under this subsection by *either the buyer or the Administrator,* as the case may be, may be brought in any court of competent jurisdiction." (Emphasis supplied.)

The statute thus prescribes in plain and unambiguous language that the plaintiff in these actions shall be either the buyer or the Administrator. The United States, in seeking to be substituted as party plaintiff, asks this Court to override this statutory requirement.

See also *Porter* v. *Warner Holding Company*, 328 U. S. 305 (401) wherein this Court held that Section 205(e) establishes the sole means "whereby the Administrator on behalf of the United States may seek damages."

If it was the intention of the Congress that the United States should be party plaintiff and that the Administrator under the Emergency Price Control Act is only a "figurehead", why were not all original civil proceedings involving that Act started in the name of Petitioner? It is obvious that the Department of Justice in notifying the various United States Attorneys throughout the country

was guilty of not giving proper instructions as to the substitution. Petitioner now seeks to rectify the mistakes by changing the rules "in the middle of the game". It seems to the Respondents that the same rules should apply to the Government as to the ordinary citizen.

In this connection see *Snyder* v. *Buck*, 340 U. S. 15 in which both parties including the Government failed to effect proper substitution as required by statute. It was contended there that Section 11 of the Judiciary Act of 1925 should be read as covering only those "actions brought against officials for remedies which could not be got in a direct suit against the United States". This Court there said:

> "Such a reading requires more than a tailoring of the Act; it requires a full alteration. Section 11 applies to 'an action * * * brought by or against an official of the United States * * * and relating to the present or official discharge of his judicial duties'. Many actions against an official relating to a 'discharge of his official duty' would in substance be suits against the United States. If the rule of abatement and substitution is to be altered in the manner suggested the amending process is available for that purpose."

Likewise in the case at bar if the United States was to have been properly substituted in its own name under the Emergency Price Control Act it is Respondents' position that the amending process of the Congress was available for that purpose. Further, to read into the Executive Orders in question what Petitioner seeks in this cause would require a "full alteration" of the Emergency Price Control Act and the Executive Orders.

Nowhere in Petitioner's Brief is there indicated why Fleming, as Administrator of the Office of Temporary

Controls, was substituted as the then Successor Administrator to Porter instead of the United States.

The Petitioner contends that it may be granted leave to maintain these actions on the theory that it is the real party in interest. This identical argument was advanced by the Government and was firmly rejected in *Bowles* v. *Wilke,* 175 F. (2d) 35 (1949) *cert. denied* 338 U. S. 861. As the Court there said, this argument begs the question in view of the language of the Emergency Price Control Act. The court stated:

> "The Government seeks to avoid the rule by insisting that it applies only to cases involving personal actions against governmental officers, and not to actions brought by such officers for the ultimate benefit of the United States; that the United States was always the 'real party in interest,' and, consequently, no substitution was required. But, in the *Fix* case, it could as truly have been said that the United States was the 'real party in interest,' in that any recovery on the bond would have inured to the benefit of the United States and not to the Collector personally. The same is true of most actions brought by an agent or arm of the United States Government. In other words, to argue that the Administrator was only a nominal plaintiff; that the United States was the real party in interest, and hence that there was no need for the Administrator's successors to comply with the rule, is to beg the question. *The fact remains that the Emergency Price Control Act provided that such actions were to be instituted and maintained by the Administrator, and the plain language of the rule calls for its application to those cases.*" (Emphasis supplied.)

Petitioner purports to cite various cases in which it indicates a conflict with the decision of the Court of Appeals in the instant action. Petitioner in its present Brief

cites the case of *Bowles* v. *Wilke*, 175 F. (2) 35 which is the latest pronouncement on the question herein involved prior to the decision in the instant case. The Petitioner attempts rather feebly to distinguish it. In the *Wilke* case, certiorari was denied by this Court on October 24, 1949 (338 U. S. 861). It is subsequent to the cases cited from the other circuits and it is obvious that this Court took into consideration the prior holdings. The holdings on the questions involved in this case in the so-called "conflicting" circuits were to a large extent merely incidental to the questions involved here.

The argument that the Price Administrator is simply a nominal plaintiff and that the United States is the real party in interest not only does violence to the statutory prescription of the party plaintiff in these actions, but also misconceives the interests involved. The provision for treble damage actions was included in the Price Control Act as one of the principal price control enforcement weapons. Accordingly, the Administrator was given control over these actions so that they could be used in the exercise of his sound administrative discretion to effectuate the purposes of the Act. Similarly, Section 205 (a) permits the Administrator to seek injunctions, Section 205 (d) authorizes him to intervene in any suit wherein a party relies upon the Act or any requirement thereunder, and Section 205 (f) authorizes him to institute a licensing system (50 App. U.S.C.A. §925 (a), (d), (f)). The role of the United States is confined to the bringing of *criminal* proscutions under Section 205 (b). Even in connection with criminal prosecutions, however, Section 205 (b) provides that whenever the Administrator has reason to believe that any person is liable to prosecution, he may certify the facts to the Attorney General.

Thus it is apparent that the statutory enforcement scheme is complete, integrated and specific and shows a conscious and deliberate delineation by Congress between the respective responsibilities and powers of the Administrator and the United States. In a situation such as this, where Congress has defined in a comprehensive manner the enforcement devices which it intended to permit, it is not for the judiciary or the executive to add new sanctions or to interpolate modifications. *Cf. Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. at 750-1 (1947).

Petitioner at Page 28 of its Brief plucks a portion of the opening paragraph of the decision in *Bowles* v. *Wilke*, 175 Fed. 2d 35 (36) and attempts to represent to this Court that the Court of Appeals in that case held that the Attorney General was authorized in the name of the United States to conduct actions under the Emergency Price Control Act. That was not the holding in that case. The Court said at Page 39 as referred to above:

> "The fact remains that the Emergency Price Control Act provided that such actions were to be instituted and maintained by the Administrator and the plain language of the rule calls for the application to those cases."

If the Congress had intended that the Price Administrator was nothing more than an *alter ego* of the United States as argued by Petitioner it seems to us that Congress would have provided that the United States and the United States alone could have brought the actions in question. The Petitioner seems to forget, or at best desires this Court to forget, that the Emergency Price Control Act is statutory. It was created by the Congress and has no more inherent functions than that which the legislative body granted it.

The letter from General Fleming of the Office of Temporary Controls addressed to the then Attorney General on April 30, 1947 and set out at Page 54 of Petitioner's Brief is of course nothing but a self-serving document of Petitioner. It even goes to the extent of stating in the first paragraph that General Fleming wished to advise the Attorney General "of my understanding of *the arrangements desired by you*".

It is no answer to say that at the present time the need for administrative discretion in enforcement of price control no longer exists. The fact remains that this was the reason which prompted Congress to draft the statute so that these actions could be instituted and maintained only by the Administrator. The statute cannot now be rewritten by the courts or by an executive order but must be left to Congress to change, if any changes in its clear language and meaning are to be made.

It is true that Section 205 (e) provides that the Administrator shall sue "on behalf of the United States". The purpose of this requirement, however, was to make certain that the sums recovered would go into the United States treasury and would not be used by the Administrator to augment the funds appropriated to him by Congress. Congress was simply protecting its supervision over administrative action through its control over the purse strings; it was not declaring that the Administrator was an automaton with only a nominal interest in enforcement litigation. Indeed, the fact that Congress specifically provided that the Administrator shall bring these actions on behalf of the United States indicates that Congress was attentive to the very problem here under consideration and that it said exactly what it intended. Where Congress has desired to authorize

the bringing of suits in the name of the United States, it has used explicit langauge, appropriate to its purpose. See *e. g.*, 25 U.S.C.A. §201; 31 U.S.C.A. §232; 40 U.S.C.A. §270b.

Cases in which the United States is permitted to sue upon a cause of action which could also have been enforced by a governmental agency are plainly distinguishable. In none of those cases does the governing statute limit the right to sue to a particular government official as does the Emergency Price Control Act.

III.

The order of dismissal is not appealable as Section 2105 of the Judicial Code prohibits reversal "for error in ruling upon matters in abatement".

With respect to the appealability of the orders entered by the District Court, we believe that they are clearly not subject to review under 28 U.S.C.A. §2105, as correctly applied in *Bowles* v. *Wilke*, 175 F. (2d) 35 (1949) *cert. denied* 338 U. S. 861. That decision squarely settles this point.

In the *Wilke* case at Page 38 the court said that it is clear

> "if the decision of the District Court in the case at bar was based on a matter in abatement not involving jurisdiction, the statute forbids a reversal by this court irrespective of the correctness of the ruling."

In referring to the holding of the District Court the court said further

> "in holding that the action had abated, the court had to determine first that the provisions of Rule 25(d) applied to Bowles successor. If the court erred in its conclusion, it committed an error in ruling upon a matter of abatement which we are precluded by statute from reviewing."

The District Judge in the cases at bar likewise determined that the provisions of Rule 25 (d) of the Rules of Civil Procedure applied and found as a part of his order (R. 20) that the Secretary of Commerce as the successor in office to the Temporary Controls Administrator had failed within six months after taking office to show satisfactorily to the court that there was a need for continuing and maintaining these actions and to move to be substituted in these actions.

Petitioner does not challenge the holding of the court in *Bowles* v. *Wilke*, 175 F. (2d) 35 (1949) cert. denied 338 U. S. 861, that the granting of defendants' motions to dismiss or abate was a "ruling upon matters in abatement." Section 2105 on its face would preclude reversal.

The reenactment of this provision as a part of the revised Judicial Code indicates a Congressional intent that it should continue as one of the important boundary posts delineating the field of federal appellate court functions. Especially is this true in the light of the excellence of the advisory work on this revision, so well described in *Ex parte Collett*, 337 U. S. 55, 65-71 (May 13, 1949). From the standpoint of this case, the significant changes in the provision are, *first*, a broadening of the reversal prohibition to cover the more general "matters in abatement" in lieu of "pleas in abatement," and *second*, the insertion of the word "upon" after "ruling" apparently because of the criticism of this omission in *McHie* v. *McHie*, 78 F. (2d) 351.

In the *Wilke* case the court cited with approval *Fix* v. *Philadelphia Barge Co.*, 290 U. S. 530, 533, that failure of a successor collector of internal revenue to make timely application for substitution "forecloses the particular remedy * * *; it does not destroy the right." Thus, it is

apparent that any possible "harshness" in applying Section 2105 arises from a purely collateral matter, *i. e.*, the one year statute of limitations. This Congressional limitation upon the period of possible liability should not be circumvented by asking that Section 2105 and Rule 25(d) be interpreted contrary to their clear language and the previous decisions of the Supreme Court. Such statutes and rules are designed to apply independently of collateral matters, such as the possibility that there may be a valid defense to a subsequent action.

In *Fleming* v. *Mohawk Wrecking & Lumber Company*, 331 U. S. 111 this Court indicated that Rule 25(d) is applicable to an action such as this. In that case this Court said (331 U. S. at page 119, 67 S. Ct. at Page 1133):

> "For these reasons Fleming is a successor in office of Porter and may be substituted as a party under Rule 25, Rules of Civil Procedure, 28 U.S.C.A. following section 723c. The rule requires a showing of 'substantial need' for continuing and maintaining the action. Though most of the controls have been lifted, the Act is still in effect. Liabilities incurred prior to the lifting of controls are not thereby washed out. *United States* v. *Hark*, 320 U. S. 531, 536, 64 S. Ct. 359, 362; *Utah Junk Co.* v. *Porter*, 328 U. S. 39, 44, 66 S. Ct. 889, 892; *Collins* v. *Porter*, 328 U. S. 46, 49, 66 S. Ct. 893, 894."

It is clear that where a final judgment has been entered, an appeal may be taken and the reviewing court may consider any prejudicial errors which may have contributed to that judgment, provided they are not errors in "ruling upon matters in abatement." Obviously, there might be other errors. *Leitensdorfer* v. *Webb*, 20 How. (61 U. S.) 176, illustrates the distinction. There a plea in abatement on the ground that the attachment affidavit was insufficient was overruled and, after a trial on the merits, plaintiff

obtained judgment. On writ of error, the Supreme Court held that section 22 of the Judiciary Act of 1789 (1 Stat. 84), from which Section 2105 is derived, prohibited reversal because of the ruling on the plea in abatement and, since the defendant failed to show error in the trial on the merits, the Supreme Court affirmed the judgment.

Whenever the provision against reversal for error in abatement rulings has been invoked, the Supreme Court has applied it. In *Stephens* v. *Monongahela Bank*, 111 U. S. 197, the Supreme Court affirmed a judgment on a ruling in abatement on the basis of the statute, saying at page 198:

> "* * * it is expressly provided that there shall be no reversal in this court or the Circuit Court for error in ruling any plea in abatement * * *. The defence is one which merely defeats the present proceeding, and does not conclude the plaintiff forever, * * *."

In *Piquignot* v. *Pennsylvania R. R. Co.*, 16 How. (57 U. S.) 104, the defendant pleaded in abatement that another suit was pending in the state court. The trial court overruled the plaintiff's demurrer to the plea and entered judgment for the defendant, which was affirmed by the Supreme Court, which said on page 104:

> "The judgment of the court below on the plea is not subject to our revision on a writ of error."

To the same effect are *McHie* v. *McHie*, 78 F. (2d) 351, *Marinette Sawmill Co.* v. *Scofield*, 174 F. 562, *Barnsdall* v. *Waltemeyer*, 142 F. 415, and *Cunningham* v. *Rodgers*, 171 F. 835.

Fitzpatrick v. *Flanagan*, 106 U. S. 648, like several other cases, was decided without reference to the statutory predecessor of Section 2105. *Buck Stove Co.* v. *Vickers*, 226 U. S. 205 and *Roche* v. *Evaporated Milk Association*, 319

U. S. 21, were both decided on the basis of express limitations in the language of Section 22 of the First Judiciary Act which restricted its application to a review of decisions in the federal courts and to civil cases. Neither of these decisions throw the slightest doubt on the application of Section 2105 to a civil case decided by a federal district court, as in the case at bar.

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment below is correct and should be affirmed.

Respectfully submited,

THOMAS J. DOWNS,
HERBERT M. JOHNSON,
JULIUS L. SHERWIN,
THEODORE R. SHERWIN,
HARRY FREEMAN,
KERNAL FREEMAN,
MICHAEL F. MULCAHY,
HENRY W. DIERINGER,
MILTON T. RAYNOR,
135 South La Salle Street,
Chicago 3, Illinois,
Attorneys for Respondents.